Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

CHARLES E. UNDERWOOD, JR.,
SUSIE G. UNDERWOOD, AND
ANTHONY C. UNDERWOOD,

Petitioners,

v.

STATE OF ALASKA,
GOVERNOR TONY KNOWLES, AND
DEPARTMENT OF REVENUE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

ROBERT JOHN
Counsel of Record for Petitioners
709 Fourth Avenue
Fairbanks, Alaska 99701
(907) 452-4454

193PP

QUESTIONS PRESENTED FOR REVIEW

(1) In view of the Fourteenth Amendment's guarantee of equal protection under the law, may the State of Alaska, which has established a Permanent Fund Dividend (PFD) program to provide an equal yearly benefit to each and every resident of the State, amend the PFD statutes after individuals have recently become residents of the State so as to deny PFD benefits to those persons solely because of their status as recent residents of the State?

(2) Where the State of Alaska PFD program has promised that a person will receive a PFD for a particular year if that person becomes an Alaska resident before a certain date and complies with the requirements of continuing residency, and in reliance upon the State's promise, a person becomes an Alaska resident by the certain date and

fully complies with the continuing residency requirements, does the State deprive that person of property without due process of law in violation of the Fourteenth Amendment when the State subsequently amends its PFD statutes so as to require the person to have become a resident at an earlier date and thereby denies the person a PFD?

(3) Where the State of Alaska PFD program has promised that a person will receive a PFD for a particular year if that person becomes an Alaska resident before a certain date and complies with the requirements of continuing residency, and in reliance upon the State's promise, a person becomes an Alaska resident by the certain date and fully complies with the continuing residency requirements, does the State effect a taking of that person's property without just compensation in violation of the Fifth and

Fourteenth Amendments when the State subsequently amends its PFD statutes so as to require the person to have become a resident at an earlier date and thereby denies the person a PFD?

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OPINION BELOW

The decision of the Alaska Supreme Court is officially reported beginning at 881 P.2d 322 (Alaska 1994). A copy of the opinion is set forth in Appendix A. (App. 1-23)

JURISDICTION OF THE COURT

The Alaska Supreme Court rendered its decision in this case on September 30, 1994. Petitioners Underwood filed a timely petition for rehearing (App. 122-133), which was denied except as to costs and attorney's fees on November 15, 1994 (App. 40-41).

Since Petitioners claimed and asserted rights under the Constitution and statutes of the United States, this Court has jurisdiction under 28 U.S.C. § 1257(a) to review by writ of certiorari the decision of the Alaska Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes, and regulations. Since the provisions are lengthy, pursuant to Supreme Court Rule 14.1(f), their pertinent text is set forth in Appendix Q (App. 144-152):

> The United States Constitution, Article I, § 10;
>
> The United States Constitution, Amendment V;
>
> The United States Constitution, Amendment XIV, § 1;
>
> Alaska Statute 43.23.005. Eligibility. [former statute]
>
> Alaska Statute 43.23.005. Eligibility. [present statute]
>
> Alaska Statute 43.23.011. Application period.

STATEMENT OF THE CASE

For many years the State of Alaska has implemented a Permanent Fund Dividend (PFD)

program which provides a yearly cash benefit to essentially all bona fide Alaska residents who apply. Over the last decade, the amount of the yearly dividend has tended to increase, with every eligible person receiving over $900.00 for each of the last several years. (App. 143) As to the PFD at issue in this case, that which was paid out in calendar year 1993, the dividend amount was approximately $949.00 per person. (App. 143)

Petitioners Charles E. Underwood, Jr., Susie G. Underwood, and Anthony C. Underwood are the three persons who first challenged the PFD scheme at issue in this case. (App. 42-45) Following in the Underwoods' stead is a class-action Complaint filed in the Alaska State courts, Gilkey v. State of Alaska, Department of Revenue, 4FA-94-758 Civil. (App. 134-138) The Gilkey case has presently been stayed pending the outcome of

the Underwoods' petition for writ of certiorari. (App. 139-141)

Based upon the most recent data available from the State of Alaska, over 55,000 people migrated to Alaska from July 1, 1991 to July 1, 1992. (App. 142) As will be discussed further, the PFD scheme at issue affects the class of persons who migrated to Alaska from January 1, 1992 through April 1, 1992, of which the Underwoods are part. Since that three-month period represents one-quarter of the July 1, 1991 to July 1, 1992 statistical year, it appears that the class of persons affected could potentially approach 10,000 to 15,000 in number.

As to the Underwoods themselves, Charles E. Underwood, Jr. originally journeyed to Alaska in 1981 and 1983 and very much enjoyed the State. During the summer of 1990, Charles, his wife Susie G. Underwood, and their son Anthony Charles Underwood

returned to Alaska and purchased a one-and-3/4 acre lot in Salcha, Alaska, with the intent of building their family home there at some future date. (App. 47)

After purchasing the Salcha property in the summer of 1990, the Underwoods returned to Saginaw, Texas, which is located outside of Fort Worth, Texas, and Charles Underwood continued working at his job at Stratoflex, Inc., an aircraft hosing and fitting manufacturer for whom he had worked since 1984. (App. 47)

Early in 1992, Charles Underwood was still working for Stratoflex, Inc. and earning $12.55 per hour; he was working 40 hours per week with occasional overtime and receiving life insurance, health insurance, and other benefits paid in part by Stratoflex, Inc. While he would have preferred to have remained at that job until late May of 1992 and then moved to Alaska with his wife

Susie and their son Anthony, Charles Underwood understood that, in order to qualify for an Alaska Permanent Fund Dividend to be paid in 1993, one had to be a resident of the State of Alaska on or before April 1, 1992. (App. 48) Underwood obtained this understanding from a June 24, 1991 letter he received from the State of Alaska, Department of Revenue in response to an inquiry he had made. (App. 132-133)

In order that the Underwoods would qualify for the 1993 Permanent Fund Dividend, Charles Underwood resigned from his job at Stratoflex, Inc. in March of 1993. The Underwoods then loaded up their possessions and drove from Texas to Alaska, arriving in Alaska on March 25, 1992, and arriving in Salcha on March 26, 1992, with the intent to remain permanently as residents of Alaska. (App. 48) Since arriving in Alaska in March of 1992, Charles E. Underwood, Jr.,

Susie G. Underwood, and Anthony C. Underwood have been and have always intended to remain permanent residents of Alaska. (App. 48-49)

Charles Underwood was planning on immediately beginning construction of the Underwoods' family home and utilizing the assets which they had toward that end; accordingly, the Underwoods were depending on and counting on receiving their 1993 Permanent Fund Dividends to assist in completing construction of their home or in meeting other needs since monies had been expended toward constructing the home. Toward the end of April 1992, Charles Underwood began constructing the family home by cutting logs, pulling them over to where the Underwoods were encamped on the property, and peeling the bark, which was all he could do given the snow still remaining on the ground. At present, the home, which is where the Underwood family has lived since arriving in

Alaska, is approximately 2/3 complete with the inside being an open shell that the Underwoods have been unable to complete due to a lack of funds. (App. 49)

In addition, as a result of leaving Texas for Alaska in March of 1992 in order to qualify for a Permanent Fund Dividend rather than in late May of 1992 so as to arrive in Alaska on June 1, 1992, as the Underwoods would have preferred, the Underwoods lost approximately $3,000.00 worth of net after-tax wages plus the related benefits which Charles Underwood was receiving from Stratoflex, Inc. (App. 50)

In early April of 1992, Charles Underwood first learned that on March 31, 1992, the legislature had passed and Governor Walter J. Hickel had signed, a law which retroactively changed the qualifying date for the 1993 Permanent Fund Dividend from April 1, 1992 to January 1, 1992. (App. 50)

This law, which effected the change by amending Alaska Statute (AS) 43.23.005(a), was part of a group of amendments to the Permanent Fund statutes. (App. 147-152)

As indicated on the underlined portions of the 1993 Permanent Fund Dividend Application (App. 52-53), the Underwoods were unable to complete and sign the application due to the retroactive changes in the law requiring them to certify under penalty of criminal offense and civil fine that they were residents of Alaska during the entire 1992 calendar year and did not claim residency in another state on January 1, 1992. In all other respects, all three persons comprising the Underwood family qualify for the 1993 Permanent Fund Dividend. (App. 50-51)

On February 18, 1993, the Underwoods filed a pro-se Complaint in the State of Alaska courts challenging the constitution-

ality of the 1992 PFD Amendments. (App. 42-45) Shortly thereafter, the Underwoods obtained counsel, responded to the State's Motion for Summary Judgment, and filed their own Motion for Summary Judgment. In these pleadings the Underwoods raised the equal protection, due process, and takings issues presented in this Petition. (App. 54-90) At oral argument, the trial judge ruled against the Underwoods (App. 26-37), and entered an order dismissing the Underwoods' Complaint with prejudice. (App. 24-25) The Underwoods sought reconsideration (App. 91-96), which the trial judge denied (App. 38-40).

The Underwoods appealed to the Alaska Supreme Court where the Underwoods raised again in their opening brief the equal protection, due process, and takings issues presented in this petition for writ of certiorari. (App. 97-121) The Alaska Supreme

Court ruled against the Underwoods in a published opinion issued September 30, 1994. (App. 1-23) The Underwoods then filed a timely petition for rehearing. (App. 122-133) On November 15, 1994, the Alaska Supreme Court denied the Underwoods' petition for rehearing. (App. 40-41)

REASONS FOR GRANTING THE WRIT

Petitioners submit that the Alaska Supreme Court has decided significant questions of federal constitutional law in a way which is in direct conflict with various decisions of this Court. As indicated, the decision of the Alaska Supreme Court affects not just the three Petitioners but perhaps 10,000 or more Alaska residents who have been wrongfully denied their 1993 PFDs. Moreover, although it might be maintained that the decision in this case affects only those persons eligible for a PFD in one

particular year, 1993, the practice of retroactive discrimination against persons who have recently migrated to a state, as approved by the Alaska Supreme Court, could easily be extended to a host of other situations where a State seeks to amend its statutes so as to either temporarily or permanently exclude recent migrants to the State from receiving benefits otherwise available to all residents of the State. Under Supreme Court Rule 10.1(c), these special and important reasons well warrant this Court's granting review via writ of certiorari. Petitioners will address these reasons concisely below.

I. The 1992 Amendments to the State of Alaska's Permanent Fund Dividend Statutes Deny the Petitioners Underwood Equal Protection Under the Law.

At the inception of the State of Alaska's PFD program, this Court struck down certain aspects of the program as being a

violation of the Fourteenth Amendment guarantee of equal protection under the law. See Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982). In so ruling, the Court explained that "[i]n addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, *protects new residents of a state from being disadvantaged because of their recent migration* or from being otherwise being treated differently from longer term residents." Zobel, 457 U.S. at 60 n. 6, 102 S.Ct. 2309, 72 L.Ed.2d at 677-68 n. 6 (emphasis added). "[W]here the 'right to travel' is involved, [t]he cases leave no doubt that it will trigger intensified equal protection scrutiny." Zobel, 457 U.S. at 66 n. 1, 102 S.Ct. 2309, 72 L.Ed.2d at 681 n. 1 (Brennan, J., joined by Marshall, Blackmun, and Powell, JJ., concur-

ring). Thus, "those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare." Id., 457 U.S. at 70, 102 S.Ct. 2309, 72 L.Ed.2d at 684 (Brennan, J., joined by Marshall, Blackmun, and Powell, JJ., concurring). The purported purposes of the 1992 PFD amendments being merely to improve the efficiency of the program's operation and to avoid confusion among applicants (App. 9-11), this is not among those "rare" cases which survive the rigors of strict equal protection scrutiny.

The denial of the Underwoods' 1993 PFDs is directly contrary to the Court's decision in Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) where the Court held that a state statute granting a property tax exemption only to those veterans who resided in the state before a certain date violated the

equal protection guarantees of the Fourteenth Amendment. As the Court reasoned, "Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the state after [a certain date]." Hooper, 472 U.S. at 623, 105 S.Ct. 2862, 86 L.Ed.2d at 496. "Neither the equal protection clause [nor the] Court's precedents, permit the State to prefer established resident[s]...over newcomers in the retroactive apportionment of an economic benefit." Id., 472 U.S. at 623, 105 S.Ct. 2862, 86 L.Ed.2d at 497.

The Alaska Supreme Court incorrectly states the test as being whether the legislation "interferes with [the Underwoods'] right to travel, thereby implicating strict scrutiny analysis." (App. at 8-9 n.2) (emphasis added). The Alaska Supreme Court's analysis conflicts with this Court's deci-

sions in Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) and Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). The gist of Dunn and Shapiro is that durational residency laws penalize the fundamental constitutional right of interstate travel so that no actual deterrence to interstate travel or migration need be demonstrated in order to require the State to prove that the classification is necessary to promote a compelling governmental interest. Dunn, 405 U.S. at 338-41, 92 S.Ct. at 1001-02, 31 L.Ed.2d at 282-83; Shapiro, 394 U.S. at 634, 89 S.Ct. at 1331, 22 L.Ed.2d at 615.

Just as the Court in Shapiro struck down a one-year residency requirement conditioning receipt of welfare benefits, so the Court should strike down the challenged legislation which penalized the Underwoods for having recently exercised their right to

interstate travel and which, on its face and as applied, imposes a durational and date-specific residency requirement by denying the Underwoods their PFDs even though they had been Alaska residents for more than nine months at the end of the newly created "qualification" period and were Alaska residents for more than one year and three months by the end of the period during which persons were allowed to apply for 1993 PFDs. As the Court has more recently explained:

> Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases....The analysis in all of these cases, however, is informed by the same guiding principle -- the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from similarly situated residents.... [R]egardless of the label we place on our analysis -- right to migrate or equal protection -- once we find a burden on the right to migrate, the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903-05 & n. 4, 106 S.Ct. 2317, 90 L.Ed.2d 899, 905-07 & n.4 (1986).

Furthermore, the evolving principles of equality embodied in the Equal Protection Clause require that certain classifications be viewed as potentially discriminatory, and when history reveals systematic unequal treatment, more searching judicial inquiry is warranted. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-42, 105 S.Ct. 3249, 87 L.Ed.2d 313, 320-21 (1985). Thus, the Court must engage in heightened scrutiny of challenged legislation where a "suspect" or "quasi-suspect" class exists. Lying v. Castillo, 477 U.S. 635, 639, 106 S.Ct. 2727, 19 L.Ed.2d 527, 533 (1986). In making this determination, the Court should consider whether, as a historical matter, the group or class at issue has been subjected to discrimination, whether the group

or class exhibits obvious, immutable, or distinguishing characteristics that define it as a discreet group or class, and whether the group is a minority or otherwise politically powerless. Id.

There is a distinct historical tendency for Alaskans to set hierarchies based upon the length of an individual's Alaskan residence, and to otherwise discriminate against recent arrivals to the State. See Zobel, supra, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672; Schafer v. Vest, 680 P.2d 1169 (Alaska 1984); Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977), reversed on other grounds, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); State v. Wylie, 516 P.2d 142 (Alaska 1973). Moreover, those who have recently moved to a state, in addition to being small in number, are a diverse and difuse group of people who lack both the brute political muscle and the political

cohesiveness to assert themselves in the legislative forum in any meaningful fashion. Cf. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4-53 n.4, 58 S.Ct. 778, 82 L.Ed. 1234, 1241 n.4-42 n.4 (1938). Indeed, given the timing of the challenged legislation and the class of persons it discriminated against, it is unlikely that any members of the class even had the opportunity to exercise the right to vote prior to being subjected to the discrimination at issue.

Whatever may have been the shortcomings of Alaska's PFD program as originally enacted, at least that program did not embody the invidious discrimination evidenced in the durational and date-specific residency requirement imposed upon the Underwoods but instead permitted a first-year resident to receive at least a pro-rata share of the PFD. See Zobel, supra, 457 U.S. at 58-59 &

n.4, 102 S.Ct. 2309, 72 L.Ed.2d at 676-77 & n.4. Even if the Court were then to apply ordinary equal protection scrutiny as in Cleburne Living Center, supra, the challenged legislation must fail because it is not "rationally related to a legitimate governmental purpose" but instead demonstrates "irrational prejudice" and disregard for the rights of the Underwoods and others who had recently migrated to Alaska. 473 U.S. at 446, 450, 105 S.Ct. 3249, 87 L.Ed.2d at 324, 326. The State of Alaska has relied "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Id., 473 U.S. at 446, 105 S.Ct. 3249, 87 L.Ed.2d at 324. As the Court has noted:

> In fact, newcomers seem more likely to become dissatisfied and to leave the State than well-established residents; it would thus seem that the State would give a larger, rather than a smaller, dividend to new residents if it wanted to discourage emigration.

> The separation of residents into classes hardly seems like a way to persuade new Alaskans that the State welcomes them and wants them to stay.

Zobel, 457 U.S. at 62 n.9, 102 S.Ct. 2309, 72 L.Ed.2d at 679 n.9.

II. The 1992 Amendments to the Alaska Permanent Fund Dividend Statutes Deprived the Petitioners Underwood of Property Without Due Process of Law in Violation of the Fourteenth Amendment.

The Underwoods came to Alaska in detrimental reliance upon AS 43.23.005 as it existed prior to and immediately after their arrival in Alaska. Indeed, the Underwoods came to Alaska at the time which they did specifically so as to comply with the provisions of AS 43.23.005, and thereby suffered the detriment of dealing with the Alaskan winter as they commenced to build their home, and moreover, incurred substantial lost income in reliance upon the statute. In cases such as the Underwoods' where persons have acted in good faith based upon

existing law so as to conform their conduct with that law, subsequent changes in that law which make their conduct nonconforming have been analyzed for a due process violation under the doctrine of vested rights.

For example, in Nemmers v. City of Dubuque, 716 F.2d 1194 (8th Cir. 1983), the court held that evidence of significant expenditures by the individual met the "use" requirement of the non-conforming use doctrine so as to give the individual a vested right in the law as it existed on the date of his conduct. Likewise, in Nasierowski Brothers Investment Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991), the court noted that purchasing property coupled with additional evidence of reliance on the existing law was sufficient to establish a property interest in the law as it existed on the date of the conduct constituting the reliance.

In essence, the Underwoods accepted the State's offer that the Underwoods would receive their 1993 PFDs if the Underwoods became Alaska residents by March 31, 1992, and continued their residency for the requisite period. As such, the Underwoods case is but a modern manifestation of the familiar law-school example where X offers to compensate Y if Y walks all the way across the Brooklyn Bridge; then, when Y has done all the preparatory work and has in fact commenced crossing the Brooklyn Bridge, X attempts to revoke the offer. Yet, the law holds that an enforceable agreement exists.

In sum, pursuant to Article I, § 10, clause 1 of the United States Constitution, which prohibits states from impairing the obligations of contract, the Underwoods have a vested right in receiving their 1993 PFDs, a right which the State of Alaska deprived the Underwoods of without due process of law

in violation of the Fourteenth Amendment. Cf. Siegal v. Follette, 290 F.Supp. 632, 635 (S.D.N.Y. 1968) ("When a right is given by a state legislature, even though it is not a right protected by the federal constitution, the arbitrary denial of that right violates the Fourteenth Amendment.") Since this deprivation involves an agreement to which the State itself is a party, rather than an agreement involving third parties, the Court must strictly scrutinize the State's actions to ensure that the Underwoods receive the full equivalent to that which they were entitled under the PFD program as it existed when they commenced their residency. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 n.15, 98 S.Ct. 2716, 57 L.Ed.2d 727, 736 n.15 (1978).

III. The 1992 Amendments to the Alaska Permanent Fund Dividend Statutes Effected a Taking of the Underwoods' Property Without Just Compensation in Violation of the Fifth and Fourteenth Amendments.

The Fifth and Fourteenth Amendments to the United States Constitution protect an individual against the unconstitutional taking of his or her property. A taking of property rights occurs where government regulation frustrates distinct investment-backed expectations, see Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124-25, 127, 98 S.Ct. 2646, 56 L.Ed.2d 631, 648-49, 650 (1978), or where government action does not substantially advance a legitimate state interest, see Nollan v. California Coastal Commission, 480 U.S. 825, 834, 107 S.Ct. 3141, 97 L.Ed.2d 677, 687 (1987).

The 1992 amendments to AS 43.23.005 plainly frustrated the Underwoods' distinct investment-backed expectations. The Underwoods intended to and did become permanent Alaska residents, and as such, had every reasonable expectation that they would re-

ceive their 1993 PFDs if they were Alaska residents on or before April 1, 1992; they accordingly forewent opportunities in Texas and moved to Alaska at the precise time they did in order to fulfill the requirements for their 1993 PFDs. Given the contractual nature of the PFD program, the State's unilateral attempt to abrogate its agreement with the Underwoods requires the payment of just compensation. Allied Structural Steel Co., supra, 438 U.S. at 244 n.15, 98 S.Ct. 2716, 57 L.Ed.2d at 736 n.15; United States Trust Co. v. New Jersey, 431 U.S. 1, 29 n.27, 97 S.Ct. 1505, 52 L.Ed.2d 92, 114 n.27 (1977).

Moreover, the burden is on the State to prove that a legitimate state interest is actually advanced in substance by the amendment at issue. Nollan, 483 U.S. at 834 & n.3, 107 S.Ct. 3141, 97 L.Ed.2d at 687-88 & n.3; see Dolan v. City of Tigard, 114 S.Ct.

2309, 2319-20, 129 L.Ed.2d 304, 318-21 (1994). Even if one then assumes, for the sake of argument only, that the State's asserted purposes for the amendment -- that of improving administrative efficiency and avoiding applicant confusion -- are legitimate ones, the State has nonetheless failed to demonstrate how denying the Underwoods their 1993 PFDs actually advances that purpose in substance. In particular, given the many hundreds of thousands of PFD applications which the State processes annually, the State has failed to demonstrate how processing three additional PFDs would pose a burden to the State, especially since under the 1993 PFD regime, applications were allowed to be submitted earlier so as to minimize the true confusion -- that created by the change in the law -- and so as to give the State more time to process those applications and send out PFDs before the end of

the year. (App. 11-13)

Finally, the State's asserted rationale of administrative efficiency and avoiding applicant confusion leave no doubt but that the 1992 PFD amendments, especially as they apply to the Underwoods, violate the equal protection component of the Takings Clause and deny the Underwoods equal protection as well. As the Court has explained:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they have not contributed to it more than any other coastal land owners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 54 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S.Ct. 1563 (1960).

Nollan, 435 U.S. at 835 n.4, 107 S.Ct. 3141, 97 L.Ed.2d at 688 n.4. The Underwoods are no more responsible for any "administrative

efficiency" or "applicant confusion" problems which the State may have than are any other persons who apply for a PFD; and the Underwoods themselves certainly were not "confused" by the PFD application process. In short, it is unconstitutional for the State to single out persons such as the Underwoods to bear the brunt of achieving the State's purported goals. Id.

CONCLUSION

Persons are entitled to rely upon the representations which a state makes concerning the effect of their conduct. This is especially so when those representations are embodied in a law codified by the State itself. It follows, *a fortiori*, that where an individual acts in reliance upon the representations or offers set forth in the laws of a State and thus actually migrates to that State, the State may not subsequently and unilaterally amend its law and revoke

its offer so as to in effect penalize the individual for his or her recent migration to the State and thereby deprive him or her, but not longer-term residents, of the very benefit which the individual otherwise would have received and which itself formed a basis for the individual's having recently exercised the fundamental constitutional right of migration.

For the reasons stated, Petitioners Charles E. Underwood, Jr., Susie G. Underwood, and Anthony C. Underwood respectfully pray that the Court grant the petition for writ of certiorari.

DATED at Fairbanks, Alaska this 13th day of February, 1995.

Respectfully submitted,

ROBERT JOHN
Counsel of Record for
Petitioners
709 Fourth Avenue
Fairbanks, Alas a 99701
(907) 452-4454

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Appellants,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Appellees.*	Supreme Court No. S-5802 Trial Court # 4FA-93-234 Civil *OPINION* No. 4124

Merit Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Mary E. Greene, Judge

September 30, 1994

Rehearing Denied November 15, 1994.

Robert John, Law Office of Robert John, Fairbanks, for appellants.

Vincent L. Usera, Asst. Atty. Gen., and Bruce M. Botelho, Atty. Gen., Juneau, for appellees.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

MOORE, Justice.

At issue in this appeal is the constitutionality of a 1992 amendment to the permanent fund dividend (PFD) statutes, Chapter 4, section 4, SLA 1992. The amendment changed the qualifying date set forth in AS 43.23.005(a) for a 1993 PFD. Charles E. Underwood, Jr., along with his wife and son, Susie G. Underwood and Anthony C. Underwood (the Underwoods), allege that they were unlawfully denied 1993 PFDs as a result of the change. They instituted this action against the State of Alaska, Governor Walter J. Hickel and the Department of Revenue (collectively "the State"), claiming that the amendment violated a number of their constitutional rights and that the State was estopped from denying their dividend applications. The superior court granted summary judgment in favor of the State. We affirm.

IV. *FACTS AND PROCEEDINGS*

The facts are not in dispute. The

Underwoods timed their move from Texas to Alaska with the specific intention of becoming Alaska residents in time to qualify for a 1993 PFD. According to Charles Underwood, he understood that in order to qualify for the 1993 PFD, the family members had to be state residents on or before April 1, 1992. Although Charles otherwise would have preferred to remain at his job in Texas until May 1992, he resigned in March. Had Charles remained at his job until late May as he desired, Charles claims he would have earned roughly another $3,000 in after tax wages. The family arrived in Alaska on March 25, 1992.

On March 31, 1992, Governor Hickel signed Chapter 4, section 4, SLA 1992, which amended AS 43.23.005 by changing the eligibility requirements for a PFD to coincide with the calendar year. As a result, to be eligible for a 1993 PFD, applicants had to

show Alaska residency as of January 1, 1992. Accordingly, persons who established Alaskan residency between January 2, 1992 and April 1, 1992 were not eligible for a 1993 PFD, whereas under prior law they would have been eligible.

The Underwoods brought suit in superior court challenging the constitutionality of the enactment. They specifically claimed that it violated the equal protection and due process guarantees of the federal and state constitutions, that it constituted an ex post facto law, that it was am impermissible taking of property, and that the State was equitably estopped from amending the law.

The superior court granted summary judgment in favor of the State on all of the Underwoods' claims. The Underwoods appeal.

V. *DISCUSSION*

The parties agree that there are no

issues of material fact, and that this case may be properly resolved as a matter of law. The constitutional and other purely legal questions at bar are issues to which this court will apply its independent judgment. *State v. Anthony*, 810 P.2d 155, 156-57 (-Alaska 1991); *Croft v. Pan Alaska Trucking*, 820 P.2d 1064, 1066 (Alaska 1991).

A. *The Challenged Enactment Does Not Violate The Underwoods' Constitutional Rights.*

Alaska Statute 43.23.005 governs the eligibility requirements for a PFD. Following the enactment of Chapter 4, section 4, SLA 1992, the statute provided that:

> (a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if
>
> . . . .
>
> (3) the individual was a state resident for a least the calendar year immediately preceding *January 1* of the current dividend year; . . . .

AS 43.23.005(a)(3) (emphasis added). Prior

to the 1992 amendment, the statute required Alaska residency for the twelve month period immediately preceding *April 1* of the current dividend year. AS 43.23.005(a)(2) (effective June 11, 1991).

1. *Equal Protection*

The Underwoods assert that the 1992 enactment denied them equal protection and opportunity under both the Federal and Alaska Constitutions. *See* U.S. Const. amend. XIV; Alaska Const. art. I, § 1. Because Alaska's equal protection clause "is more protective of individual rights than the federal equal protection clause," *State v. Anthony*, 810 P.2d at 157, we focus our analysis on the Alaska Constitution. [1]

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[1] Article I, section 1 of the Alaska Constitution states, "[t]his constitution is dedicated to the principle[] that ... all persons are equal and entitled to equal rights, opportunities, and protection under the law...." Although the parties do not specifically address the issue, the class allegedly subject to disparate treatment

We have adopted a sliding scale approach to equal protection questions. *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978). Under this approach, "'[t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.'" *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (quoting *State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983)). As the level of scrutiny selected moves up the sliding scale, the asserted governmental interests must be relatively more compelling, and the legislation's means-to-ends fit must be correspondingly closer. *Ostrosky*, 667 P.2d at 1193. Conversely, "if relaxed scrutiny

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under the amendment includes all persons who would have been eligible for a 1993 PFD but for the three month change in the qualifying date.

is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated." *Id.* (footnote omitted).

We have held that an individual's interest in a PFD "is merely an economic interest and therefore is entitled only to minimum protection under our equal protection analysis." *Anthony*, 810 P.2d at 158. Under this minimum level of scrutiny, the State must show that the challenged enactment was designed to achieve a legitimate governmental objective, and that the means bear a "fair and substantial" relationship to the accomplishment of that objective. *Cosio*, 858 P.2d at 629; *Anthony*, 810 P.2d at 158-59.[2]

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[2] Although the Underwoods acknowledge that the rational basis test ordinarily applies to a person's interest in a PFD, they assert that the 1992 enactment interferes

The State asserts that the purpose of the challenged legislation was to improve the overall efficiency of the PFD program. By moving the qualifying date to coincide with the calendar year, the PFD division of the Department of Revenue gains three months to process applications. This additional time should result in earlier detection of ineligible applicants and fewer improperly paid PFDs, less need for temporary staff to process applications, and quicker resolution of questioned applications, thereby decreasing the number of delayed payments. The State also asserts that the amendment was intended to simplify the PFD program, thereby decreasing public confusion and minimizing the many date-related errors that result

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with their right to travel, thereby implicating strict scrutiny analysis. However, the issues in this case do not implicate the right to travel and are properly subject to rational basis review.

in missed dividends.

These objectives are legitimate ones, and we reject the Underwoods' argument to the contrary. The Underwoods contend that the cited objectives are not legitimate because they are based on cost savings and efficiency. *See Herrick's Aero-Auto-Aqua Repair Serv. v. State, Dep't of Transp.*, 754 P.2d 1111, 1114 (Alaska 1988) ("[C]ost savings alone are not sufficient government objectives under [Alaska's] equal protection analysis."). However, the challenged legislation here is distinguishable from that in *Herrick's*. It is not justified solely by cost savings that are "achieved by excluding a class of persons from benefits they would otherwise receive." *Id.* (qucting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 272 (Alaska 1984)). Moreover, the State's goals of improved efficiency and consumer understanding represent different objectives

than the mere goal of cost savings discussed in *Herrick's* or in *Brown*. *See id.; Brown*, 68 P.2d at 272. We therefore conclude that the goals of the 1992 amendment pass the legitimacy test.

The means-to-end tailoring of the amendment also satisfies the "fair and substantial relation" test. In arguing to the contrary, the Underwoods largely look to the fact that the State extended the application period for 1993 PFDs through June 1992.[3] Their argument is that, because the *application* period for 1993 PFDs was extended, the legislature also could and should have extended the *eligibility* period for 1993 PFDs.

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[3] The PFD application period is governed by AS 43.23.011, which became effective on January 1, 1993 and requires that applications for PFDs be filed between January 2 and March 31 of the dividend year. Chapter 4, section 19(b), SLA 1992 provided that, notwithstanding this section, the application period for 1993 would extend through June 30, 1993.

However, the extended application period was specifically intended to reduce public confusion resulting from the 1992 statutory amendments, and it is substantially related to the purpose of the legislation. Moreover, the fact that the application time was extended says little about the claims at issue in this case. The State does not assert that it rejected the Underwoods' applications because of the additional burden in processing them. The issue is merely whether the changed qualifying date is fairly and substantially related to the goals of the 1992 amendments. Certainly, the State *could* have elected to permit applicants to achieve the one year residency requirement any time during the extended 1993 application period, thereby resulting in acceptance of the Underwoods' applications. However, the State's decision not to extend the qualifying date along with the application dead-

line does not mean that the enactment fails to satisfy the fair and substantially related to the goals of the 1992 amendments. Certainly, the State *could* have elected to permit applicants to achieve the one year residency requirement any time during the extended 1993 application period, thereby resulting in acceptance of the Underwoods' applications. However, the State's decision not to extend the qualifying date along with the application deadline does not mean that the enactment fails to satisfy the fair and substantial relation test. To the contrary, viewing the goals and means of the challenged legislation, we conclude that the State was not constitutionally required to extend the eligibility period for 1993 PFDs simply because it was feasible to do so.

The Underwoods next rely on *Isakson v. Rickey*, 550 P.2d 359, 363-65 (Alaska 1976), to argue that the exclusion of people in

their situation from 1993 PFD eligibility fails the fair and substantial relation test. However, *Isakson* does not control the outcome in this case. There, the purpose of the challenged statute was to allocate limited entry commercial fishing permits, with selection to be based upon certain hardship standards. *Id.* at 360. To demonstrate hardship, the statute specified that the applicant must have been the holder of a gear license prior to a cut-off date of January 1, 1973. *Id.* at 360-61. It was assumed that holders of gear licenses obtained after January 1, 1973 cut-off date was not fairly and substantially related to identifying the hardship necessary for an entry permit. *Id.* at 365. We found that the cut-off date was both overbroad and under inclusive because it would exclude other persons who actively participated in and were economically dependent upon the

fishery. *Id.*

The statute at issue in *Isakson* cannot be logically compared to the challenged amendment in this case. Unlike the extremely loose tailoring in *Isakson*, the action moving the qualifying date for 1993 PFDs by three months is fairly and substantially related to the purpose of simplifying the PFD program in order to decrease public confusion and to improve efficiency and accuracy in administering the program. There is no significant danger of over or underinclusiveness as a result of the State's action.

Because the challenged amendment derives from a legitimate governmental objective, and the means bear a fair and substantial relation to that objective, the 1992 amendment to AS 43.23.005(a) survives minimal scrutiny under Alaska's Constitution. Accordingly, the Underwoods' equal protec-

tion claim fails.

2. *Due Process*

The Underwoods next assert that the enactment violated their due process rights because upon their arrival in alaska in March 1992, they had a vested right to 1993 PFDs, subject only to their continuing residence.[4] We disagree.

As of March 31, 1992, the Underwoods had been Alaska residents for approximately six days, far short of the twelve month requirement of AS 43.23.005 as it existed when the Underwoods arrived. At that time, the Underwoods possessed nothing more than an inchoate expectancy of a 1993 PFD that is

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[4] Article I, section 7 of the Alaska Constitution provides:

> "No person shall be deprived of life, liberty, or property, without due process of law...." The Fifth Amendment to the United States Constitution contains a similar guarantee.

not afforded constitutional protection. *See Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 n.4 (Alaska 1985) (vested property rights are protected against state action by the due process clauses of the Alaska and United States Constitutions); *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960) (same).

The Underwoods cite to real property cases from other jurisdictions to support their claim that their reliance on AS 43.23.005 at the time of their move to alaska should give them a vested right in the law as it existed on the date of their move. The Underwoods' analogy between real property transactions and the present case is unpersuasive. Unlike real property situations in which the complaining party indisputably possess property rights in specific land, the Underwoods had no property right

whatsoever in a 1993 PFD.[5] Accordingly, there is no due process violation in this case.

3. *Ex Post Facto Law*

The Underwoods next assert that the 1992 amendment constitutes an ex post facto law in violation of the Alaska Constitution.[6] An ex post facto law is a law "'passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.'" *Danks v. State*, 619 P.2d 720, 722 n.3 (Alaska 1980) (quoting

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[5] Similarly, because the Underwoods had nothing more than an inchoate expectancy of a 1993 PFD, they had no property that could have been the subject of a taking in violation of the Fifth Amendment of the Federal Constitution and Article I, section 18 of the Alaska Constitution. Accordingly, this argument also fails.

[6] Article I, section 15 of the Alaska Constitution provides that "[n]o bill of attainder or ex post facto law shall be passed...."

Black's Law Dictionary 520 (5th ed. 1979)).

In determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *See Norton*, 695 P.2d at 1092; *see also Black's Law Dictionary* 1317-18 (6th ed. 1990) (A "retrospective" or "retroactive" law is generally defined as a law which "takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.") (citation omitted). The Underwoods had no vested right to a 1993 PFD as of March 31, 1992, just as no Alaskan had a vested right to a 1993 dividend at that time.[7] Therefore,

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[7] In fact, because the entire dividend program is a creature of the legislature, it could have been abolished during the 1992 legislative session, so that no Alaskan

under a vested rights inquiry, the amendment clearly does not constitute an impermissible ex post facto law in violation of the Alaska Constitution. *See Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n. 12 (Alaska 1989) (a statutory change which merely disappoints economic expectations and does not affect vested rights is not an ex post facto law).

The Underwoods alternatively urge us to reject a vested rights inquiry and instead review the challenged enactment for fairness and reasonableness. *See Norton*, 695 P.2d at 1092-93 (noting the deficiencies of the vested rights analysis in determining whether a statute is in fact retroactive and whether it is unconstitutional); 2 Norman J. Singer, *Sutherland Statutory Construction* § 41.05, at 369-71 (5th ed. 1993) (fairness

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received a 1993 PFD.

considerations represent a more meaningful standard of evaluating retroactive laws than a vested rights analysis). Even under such a standard, however, we find that the 1992 amendment at issue in this case withstands constitutional scrutiny.

The effective date of the 1992 amendment as to AS 43.23.005 was January 1, 1993. The amendment made state residency during calendar year 1992 relevant to eligibility for a 1993 PFD, thereby bearing some relation to events dating back to January 1, 1992, instead of April 1, 1992 as under the prior law. We are satisfied that this change did not unfairly o unreasonably impinge upon any property rights or settled expectations. Thus, we find that the amendment does not violate the constitutional prohibition against retroactive legislation. The Underwoods' claim on this ground therefore fails. *See, e.g., ARCO Alaska, Inc. v.*

State, 824 P.2d 708, 710-12 (Alaska 1992) (upholding a tax law amendment which retroactively applied to a seven month period); *Wien Air Alaska, Inc. v. State, Dep't of Revenue*, 647 P.2d 1087 (Alaska 1982) (assuming the constitutionality of amendments to a tax statute retroactively applying to a six month period).

B. *The State Is Not Equitably Estopped From Denying the Underwoods Their 1993 PFDs.*

The Underwoods lastly claim that the State should be estopeed from enforcing the 1992 amendment as to them because they acted in detrimental reliance on the prior law. We reject this claim. In short, the Underwoods undertook a calculated risk when they decided to move to alaska in March rather than May of 1992. The State engaged in no conduct encouraging this action, or in any way guaranteeing that the Underwoods would qualify for a 1993 PFD if they arrived in

March. Thus, while it is unfortunate that the Underwoods' calculated risk did not pay off, the State is not obligated to pay for any losses incurred by the Underwoods as a result of their decision to move to Alaska in March.

VI. *CONCLUSION*

The State's amendment to the eligibility statute for 1993 PFDs did not violate the Underwoods' constitutional rights. Nor is the State equitably estopped from denying the Underwoods a 1993 dividend. Accordingly, the superior court's order granting summary judgment in favor of the State is AFFIRMED.

APPENDIX B

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

ORDER ON SUMMARY JUDGMENT

THE COURT, having reviewed Defendants' motion and any opposition thereto, being fully advised in the premises and finding good cause therefor,

NOW ORDERS that Summary Judgment is entered in favor of the Defendants and the above-captioned action is DISMISSED with prejudice for reasons set forth on the record. The parties shall bear their own costs and attorney's fees.

DATED this 25th day of May, 1993 at Fairbanks, Alaska.

/s/ Mary E. Greene
MARY E. GREENE
JUDGE OF THE SUPERIOR COURT

APPENDIX C

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

EXCERPT FROM HEARING ON MOTIONS

May 25, 1993
3:29 p.m.
Fairbanks, Alaska

BEFORE THE HONORABLE MARY E. GREENE
Superior Court Judge

Pages 8-14

THE COURT: Okay. Thank you.

First question I think arises in looking at this case is whether or not there's a vested right that is being infringed upon and I find that there is no vested right,

that what existed was an expectancy only and that's not the kind of property that the court tends to protect or tends to afford constitutional protection. Vested rights do have constitutional protection as the court in Alaska set out in Norton versus ABC Board, 695 P.2d 1090 at 1092. But looking at the kinds of rights that are protected this is merely an expectancy. It's not a vested right in fact until a full year has passed so that that in fact -- the Underwoods would not have a vested right until -- it would have been April 1st of 1993, long after the statute had been changed. And in looking at that I'm relying on Bidwell versus Sheele, 355 P.2d 584, which is an Alaska 1960 case that's relied on in Norton. As well, I'm persuaded by Hoffman versus City of Warwick, 909 F.2d 609, First Circuit 1990, Property Owners versus City of H.S. Laster Company, 730 P.2d 267, Arizona App

1986. The first specific question that's raised is whether or not this is an ex post facto application of the law in violation of the constitution. Clearly under the U.S. Constitution ex post facto prohibitions apply only as to to criminal statutes. It's my belief that that is true in Alaska as well. However, even assuming that that's not the case, under the Property Owners versus City of Ketchikan, 718 P.2d 567, 574 note 12, there the Alaska Supreme Court held that a statutory change which disappoints economic expectations is not ex post facto. And to the extent that it applies to civil law in Alaska, which I don't believe is true, there would be no violation here. The second issue has to do with due process. To the extent that a substantive process challenge is being raised the only inquiry that the court makes with respect to substantive due process in this state is whether the act

furthers a legitimate governmental purpose. That's from Mobile Oil Company versus Local Boundary Commission. Clearly here the act further the legitimate governmental purpose, that being decreasing confusion among Alaska residents regarding filing and an increased program efficiency, and therefore there can be no substantive due process challenge. With respect to a due process challenge in the taking clauses of the U. S. Constitution or Alaska Constitution, here, because it's not a vested right, there is no property interest which is subject to due process protections. The next claim that's raised is an equitable estoppel claim. There are four elements of equitable estoppel claim against the government. First of all the assertion of a position; second, reasonable reliance; third, resulting prejudice; and fourth, the public interest. I find that this claim fails to meet the first, second,

four -- and fourth of those elements of equitable estoppel. First of all with respect to the assertion of the position, in all of the cases that apply equitable estoppel against a governmental body there has to be some sort of communication of a position to an individual, not to a class of people such as the enacting of a broad-based, broad applicability statute. Things such as variances or some sort of quasi contractual assertion to an individual falls within that assertion in principle. There was certainly reliance here. I have a question as to whether or not it was reasonable reliance in fa-- in light of the facts that we talked about a few minutes ago, that being that the change was in a pre-filed bill. It was certainly a possibility that the legislature was going to change it. Certainly, with respect to the legislature's past dealings with respect to the eligibility requirements

for PFDs it's been a frequent matter of change. The legislature has not just enacted eligibility requirements and left them alone. That's the one thing that they tend to change most often with respect to permanent fund dividends. There was resulting prejudice on undisputed facts, however, I find as well that the pubic interest does not favor the result claimed in terms of an application of equitable estoppel. Primarily, because again, this was a broad communication to the world in a statue, it wasn't something that was directed towards an individual. The final claim that's made is equal protection. First of all I find that the right to travel is not affected and therefore it's the -- the test that's applicable is the minimum level of scrutiny that the Supreme Court applied in Anthony and found specifically applicable to permanent fund dividend issues in Anthony. The ques-

tion then is whether there's a fair and substantial relation to the object of the legislation from the classification itself. The state makes out a good argument that the primary purpose of the change was to decrease confusion among alaska citizens and residents regarding filing requirement and filing time lines nd a corresponding increase in program efficiency. The classification here, which basically just moved the date from November 1st -- I'm sorry, from April 1st back to January 1st is fairly and substantially related to that object. And despite the fact that there are ways that the legislature could have done it, specifically that one -- that which has been discussed which is to make it prospective for the following year only so that it would only be applicable in 1994, given the length of time that it takes to enact a change in the permanent fund dividend and have it be

meaningful, which is at least a full year, I find that it was not a constitutional violation to do it the way that the legislature chose to do it. I certainly have some sympathy for the Underwoods' position having moved to the state believing that they were going to become entitled to a permanent fund dividend and giving up some wages as a result. However, I don't find that there is a constitutional requirement that the legislature maintain the law as it was and I find that equitable estoppel's not called for on these circumstances. In light of those facts I'll grant (sic) the state's summary judgment motion and deny the defendant's summary ju-- cross motion for summary judgment. Any questions on either side?

MR. USERA: No questions, Your Honor.

MR. JOHN: I guess, Your Honor, just one question on the fair and substantial rela-

tion on equal protection there, I understand the court's reasoning on the whole, but as to Mr. Underwood's case as applied, he was quite well aware of the law when he moved up here and there doesn't really seem to be a (indiscernible) relation as to the facts of his case because he was aware of the period when he moved up here and the purpose doesn't really seem to be served as to him and his family in particular.

THE COURT: I don't think you make that kind of particular challenge. I mean certainly -- the state wasn't looking to prejudice Mr. Underwood's rights. There were making a broad-based application of a general application law. Therefore, he wasn't singled out. They were looking at rather the broader-based reasons for a change and made those. Okay?

MR. UNDERWOOD: Could I ask a question?

(Whispered conversation)

MR. UNDERWOOD: My question is can the government change a law after you're already here? I mean that seems illegal to me.

(No audible reply)

MR. JOHN: Okay. I guess Mr. Underwood's question may go.....

She's ruled on that.

But he's (sic) question is whether the government can change a law when one has acted in reliance upon it, but I believe Your Honor has ruled on that.

THE COURT: It depends. I mean if there's a vested right, no, they can't. But I find that this wasn't a vested right. It's the right -- the right you didn't earn until '93. The right to a permanent fund under the old statute you would have earned March 31st of 1993 -- 1993. I'm not sure -- 1994, 19-- year, 1993. I got the dates wrong. They changed the law long time be-

fore you actually earned the right to a permanent fund dividend even under the old law. You were just at the very beginning of your qualification period when the law was changed and they changed it retroactively. They can do that as long as it's not a vested right. Okay?

MR. UNDERWOOD: But you know that -- you know, you had to be here by a certain date to qualify and then you had to continue to make the requirement.

THE COURT: That's right.

MR. UNDERWOOD: I met the requirement of being here by the date they said.....

THE COURT: But for the.....

MR. UNDERWOOD: .....and then they change it after I already had been here the date they said.

THE COURT: And that's fine. You read the cases that I've cited here, they'll tell you that's fine. It's only if you have

the right right at that moment before there's a change and then they make it retroactive to before then that there's a constitutional violation. Okay?

All right. We'll be in recess. Thank you.

MR. USERA: Your Honor?

THE COURT: Yes?

MR. USERA: Will you be issuing any written opinion?

THE COURT: No.

MR. USERA: Okay. Thank you.

THE CLERK: Off record.

APPENDIX D

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

ORDER GRANTING MOTION FOR RECONSIDERATION

The Court, having considered Plaintiffs' Motion for Reconsideration of the Court's Summary Judgment decisions of May 25, 1993, and Defendants' Opposition, if any, and being otherwise fully advised in the premises;

IT IS HEREBY ADJUDGED, ORDERED, and DECREED that Plaintiffs' Motion for Reconsideration is **GRANTED**. Accordingly, the Plaintiffs' Motion for Summary Judgment is

hereby **GRANTED** and the Defendants' Motion for Summary Judgment is hereby **DENIED**.

ENTERED this ____ day of June, 1993, at Fairbanks, Alaska.

MARY E. GREENE
SUPERIOR COURT JUDGE

6/12/93
Denied.
/s/ M. E. Greene
Mary E. Greene

APPENDIX E

THE SUPREME COURT OF THE STATE OF ALASKA

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Appellants,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Appellees.*	Supreme Court No. S-5802 4FA-93-234 Civil *ORDER*

Before: Moore, Chief Justice, Rabinowitz, Matthews, Compton, and Eastaugh, Justices.

On consideration of the petition for rehearing filed on October 10, 1994,

IT IS ORDERED:

1. The petition for rehearing is GRANTED as to the issue of costs and attorney fees. No costs or attorney fees are awarded against Appellants Underwoods.

2. The petition for rehearing is otherwise DENIED.

Entered by direction of the court at

Anchorage, Alaska on November 15, 1994.

/s/ J Hansen
JAN HANSEN
Clerk of the Supreme Court

APPENDIX F

Charles E. Underwood Jr.
7104 Sanshore Dr.
Salcha, Alaska 99714
907-488-2332

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

PRO SE COMPLAINT

Concerning the payment of the permanent fund dividend to those individuals who arrived in Alaska before the law changed on March 31, 1992 effecting the qualifying date.

I. Whereas the state of Alaska changed the law concerning the qualifying period for the permanent fund dividend (PFD) program, and

which Governor Hickel passed into law on March 31, 1992.

II. Whereas the law discriminates against those individuals who moved to Alaska from January 2nd through March 31st 1992. Seeing that those individuals who moved up to Alaska and qualified under the old April 1st (PFD) law deadline, and thus they qualified according to the law at the time of their arrival to Alaska.

III. Whereas no on had any way of knowing whether or not Governor Hickel would change the present paw. And I had faith that the Alaska Government would be true to it's laws that were in effect when I moved up here. Again, I had already arrived in Alaska and established residency under the then present laws before the March 31st change.

IV. Whereas I would not have moved to Alaska during the cold of March and April if I had known of the up coming law change. I

moved to Alaska and established residency on March 25, 1992. My family and I lived in a tent on our land and suffered from the cold of -15 degrees many nights and -29 degrees on one night. We also had more than two feet of snow which snowed our road in until I shoveled out over 1/4 of a mile.

So, because of all of this, the Alaska state government, Governor, or the Dept. of Revenue should pay an amount equal to the 1993 (PFD) (which is paid out in 1993 for 1992) to myself and wife, and son, which moved to Alaska and qualified under the then current Alaska laws concerning the (PFD) prior to the change in the law on March 31, 1992. Additionally, if found liable, all court cost and fees should be paid to me. Also, standard interest money should be paid to me if the money is not received by October 31, 1993.

CHARLES E. UNDERWOOD, JR.

/s/ Charles E. Underwood Jr.
2/18/1993
/s/ Anthony C. Underwood by
Charles Underwood

/s/ Susie G. Underwood

APPENDIX G

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

AFFIDAVIT OF CHARLES E. UNDERWOOD, JR.

STATE OF ALASKA)
) ss:
FOURTH JUDICIAL DISTRICT)

I, Charles E. Underwood, Jr., first being duly sworn upon oath, hereby states as follows:

1. That, I am a natural person over the age of 18 years and a resident of the Fourth Judicial District

2. That, I have personal knowledge of

the contents of contained herein and am competent to testify thereto;

3. That, I, along with my wife Susie G. Underwood and my eight-year-old son Anthony Charles Underwood, are Plaintiffs in the above-captioned action.

4. That, having previously been to Alaska in 1981 and 1983 and very much enjoyed the State, during the summer of 1990, I, my wife Susie and my son Anthony Charles Underwood returned to Alaska and purchased a 1-3/4 acre lot in Salcha, Alaska with the intent of building our family home there at some future date.

5. That, after purchasing the Salcha property in the summer of 1990, my family and I returned to Saginaw, Texas, which is located outside of Fort Worth, Texas, and I continued working at my job at Stratoflex, Inc., an aircraft hosing and fitting manufacturer for whom I had worked since 1984.

6. That, early in 1992, I was still working for Stratoflex, Inc. and earning $12.55 per hour, working 40 hours per week with occasional overtime and receiving life insurance, health insurance and other benefits paid in part by Stratoflex, Inc. While I would have preferred to have remained at that job until late May of 1992 and then moved to Alaska with Susie and Anthony, I understood that in order to qualify for an Alaska Permanent Fund Dividend to be paid in 1993, one had to be a resident of the State of Alaska on or before April 1, 1992. Accordingly, and in order that my wife, my child and I could qualify for the 1993 Permanent Fund Dividend, I resigned from my job at Stratoflex, Inc. in March of 1993 and we loaded up our possessions and drove from Texas to Alaska, arriving in Alaska on March 25, 1992 and arriving in Salcha on March 26, 1992 with the intent to remain permanently

as residents of Alaska.

7. That, since I was planning on immediately beginning construction of our family home and utilizing the assets which I had toward that end, I and my family were depending on and counting on receiving our 1993 Permanent Fund Dividends to assist in completing construction of our home or in meeting other needs since monies had been expended toward constructing the home. Toward the end of April 1992, I did in fact begin constructing the family home by cutting logs, pulling them over to where we were encamped on our property and peeling the bark, which was all I could do given the snow still remaining on the ground. Presently, the home, which is where we have lived since arriving in Alaska, is approximately 2/3 complete with the inside being an open shell that I am unable to complete at present due to a lack of funds.

8. That, since arriving in Alaska in March of 1992, I, my wife and my son have been and have always intended to remain permanent residents of Alaska.

9. That, as a result of leaving Texas for Alaska in March of 1992 in order to qualify for a Permanent Fund Dividend rather than in late May of 1992 so as to arrive in Alaska on June 1, 1992, as I would have preferred, I lost approximately $3,000.00 worth of net after-tax wages plus the related benefits which I was receiving from Stratoflex, Inc.

10. That, in early April of 1992, I first learned that the legislature had passed a law and Governor Walter J. Hickel had signed that law on March 31, 1992, retroactively changing the qualifying date for the 1993 Permanent Fund Dividend from April 1, 1992 to January 1, 1992.

11. That, as indicated on the under-

lined portions of the 1993 Permanent Fund Dividend Application attached to this Affidavit as Exhibit 1, I, Susie, and Anthony Charles Underwood are unable to complete and sign the application due to the retroactive changes in the law requiring us to certify under penalty of criminal offense and civil fine that we were residents of Alaska during the entire 1992 calendar year and did not claim residency in another state on January 1, 1992. In all other respects, all three of us qualify for the 1993 Permanent Fund Dividend.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Charles E. Underwood Jr.
Charles E. Underwood, Jr.

SUBSCRIBED AND SWORN TO before me this 9th day of April, 1993 at Fairbanks, Alaska.

/s/ Elizabeth Starkey Svenson
Notary Public in and for Alaska
My Commission Expires: 6-1-96

EXHIBIT 1

1993 Alaska Permanent Fund Dividend
Adult Application **A**

* * *

Residency Certification by the Applicant
12. Signature. It is important that you **READ THE FOLLOWING STATEMENT BEFORE SIGNING.** If you make any change to this statement you will be denied a permanent fund dividend. You must sign this certification to have a valid application.

I certify under penalty of unsworn falsification that i am now and intend to remain an Alaska resident indefinitely, was an Alaska resident for the entire 1992 calendar year*, and have been physically present in Alaska at some time during 1991 or 1992, unless that physical presence requirement has been waived by the Commissioner of Revenue as a result of a national military emergency. I **further certify** that since January 1, 1992 I have not received any benefit as a result of claim of residency in another state, or claimed residency in another state.*

* * *

12. Signature Date
X /s/ Charles E. Underwood 4-8-93
* _____ except above underlined.

* * *

I certify under penalty of unsworn falsification that I have read and understand the eligibility requirements of the permanent Fund Dividend program, and that to the best of my knowledge and belief the adult named on this application was an Alaska resident

for the entire 1992 calendar year*, is still an Alaska resident and is otherwise eligible for a 1993 dividend.

* * *

APPENDIX H

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiffs, by and through their counsel the Law Office of Robert John, and hereby submit their Memorandum in Opposition to the Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment.

INTRODUCTION

Defendants' Memorandum in Support of

Motion for Summary Judgment discusses only the denial of Plaintiffs' rights to equal protection under the 14th Amendment to the United States Constitution and Article I, § 1 of the Alaska Constitution. While one basis for granting relief in favor of Plaintiffs is the denial of their equal protection rights, additional bases exist as will be discussed in this Memorandum. Those bases include: (1) the passage of an unconstitutional *ex post facto* law in violation of Article I, § 10 of the United States Constitution and Article I, § 15 of the Alaska Constitution; (2) a deprivation of Plaintiffs' property without due process of law in violation of the 14th Amendment to the United States Constitution and Article I, § 7 of the Alaska Constitution; and (3) an unconstitutional taking of Plaintiffs' property in violation of the Fifth and Fourteenth Amendments to the United States Con-

stitution and Article I, § 18 of the Alaska Constitution. As such, Plaintiffs' action is brought pursuant to the Federal Civil Rights statute 42 U.S.C. § 1983, as well as pursuant to AS 22.10.220(g), and AS 44.62.-300.

DISCUSSION

I. The 1992 Amendments To AS 43.23.005 Constitute An Unconstitutional *Ex Post Facto* Law.

With respect to Plaintiffs' 1993 Permanent Fund Dividend (PFD), as the Defendants explain at pages 1-2 of their Memorandum:

> Prior to enactment of the amendments to AS 43.23.005, eligibility was predicated on one being a state resident for twelve consecutive months prior to April 1 of the dividend year. The amendment changed that to residency for the calendar year prior to the year of application. The amendments became effective January 1, 1993, thus to be eligible for a Permanent Fund Dividend in 1993, an individual must have established residency prior to January 1, 1992.

As the Defendants concede, Governor Hickel did not sign the amendments until March 31, 1992, six days after the Plaintiffs arrived in Alaska as their permanent residence. (Complaint, para. 1; Answer para. 1); *see* Exhibit 1, former AS 43.23.005; Exhibit 2, present AS 43.23.005.

As the Alaska Supreme Court explained in *Danks v. State*, 619 P.2d 720 (Alaska 1980);

> An ex post facto law is a law "passed after the occurrence or commission of an act, which retrospectively changes the legal consequences or relations of such act or deed." Black's Law Dictionary at 520 (5th ed. 1979).

Danks, 619 P.2d at 722 n.3. In this case, Plaintiffs' actions in leaving their home in Texas, driving to Alaska, and making their permanent residence here as of March 25, 1992 had a distinct legal affect under the law in existence at the time. Under that law, AS 43.23.005 as in effect on the date

of Plaintiffs' permanent arrival in Alaska, Plaintiffs would be qualified for a 1993 Permanent Fund Dividend. It was only the subsequent passage of amendments to AS 43.23.005, effectively making the statute retroactive so as to require residency on January 1, 1992, that altered the legal effect of Plaintiffs' conduct and their rights in relation thereto. As such, under *Danks*, the 1992 amendments to AS 43.23.005 are an unconstitutional *ex post facto* law.

II. The 1992 Amendments to AS 43.23.005 Deprive Plaintiffs of Property Without Due Process of Law.

As detailed in the accompanying Affidavit of Charles E. Underwood, Jr., the Plaintiffs clearly came to Alaska in detrimental reliance upon AS 43.23.005 as it existed subsequent to their arrival. Indeed, Plaintiffs came to Alaska at the time which they did specifically so as to comply with the

provisions of AS 43.23.005, and thereby suffered the detriment of dealing with the Alaskan winter as they commenced to build their home, and moreover incurred substantial lost wages in reliance upon the statute. In cases such as the Plaintiffs', where persons have acted in good faith based upon existing law so as to conform their conduct with that law, subsequent changes in the law which make their conduct nonconforming have been analyzed under the doctrine of vested rights or as a species of estoppel.

For example, in *Kolesar v. Rezoning Hearing Board of Borough of Bell Acres*, 543 A.2d 246, 248 (Pa. Cmnwlth. 1988) the Court held that the Plaintiff's good faith reliance on the rezoning status or use existing at the time of his conduct estopped the Municipality from prohibiting the use. Similarly, in *Nemmers v. City of Dubuque*,716 F.2d 1194 (8th Cir. 1983), the court held

that evidence of significant expenditures by the defendant met the "use" requirement of the non-conforming use doctrine so as to give the plaintiff a vested right in the law as it existed on the date of his conduct. Likewise, in *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), the court noted that purchasing property coupled with additional evidence of reliance on the existing law was sufficient to establish a property interest in the law as it existed on the date of the conduct constituting the reliance.

Along the same line, in *Municipality of Anchorage v. Schneider*, 685 P.2d 94 (Alaska 1984), the Alaska Supreme Court held that a government entity may be estopped from enforcing its laws where the property owner has acted in detrimental reliance upon the laws. The general elements for such an

estoppel are: "(1) assertion of a position by conduct or word, (2) reasonable reliance thereon, and (3) resulting prejudice." *Id.* at 97. In this case, the State of Alaska, via AS 43.23.005 as it existed prior to the 1992 amendments, asserted a position by word, by statute, that one could qualify for a permanent fund dividend by being a resident of Alaska by April 1 of the previous calendar year. The Plaintiffs reasonably relied upon this statute and suffered prejudice thereby in terms of lost income and of hardship in enduring the winter outdoors and having to begin constructing their home under difficult circumstances. Moreover, granting Plaintiffs their 1993 dividend will not significantly prejudice the public interest by creating an arbitrary and unjust result. *See id.* To the contrary, failing to recognize Plaintiffs' rights to their 1993 PFD would be an arbitrary and unjust

result. Accordingly, the 1992 amendments to AS 43.23.005 deprive the Plaintiffs of property without due process of law. *See Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 101 (Alaska 1974).

III. The 1992 Amendments to AS 43.23.-005 Effect an Unconstitutional Taking of Plaintiffs' Property.

A taking of property rights occurs where government action deprives a person of the economic advantages of ownership, *see Ehrlander v. State, Department of Transportation and Public Facilities*, 797 P.2d 629, 633 (Alaska 1990), or where government action does not substantially advance a legitimate state interest, *see Nollan v. California Coastal Commission*, 480 U.S. 825, 834, 107 S.Ct. 3141, 97 L.Ed.2d 677, 687 (1987). In Plaintiffs' case, the 1992 amendments to AS 43.23.005 plainly deprive Plaintiffs of the economic advantage of their 1993 Perma-

nent Fund Dividends. Moreover, even if one assumes for the sake of argument that the asserted purported purpose of the amendments "to improve the efficiency of the [PFD] program's operation," (Defendants' Memorandum at 5) is a legitimate one, the Defendants have failed to demonstrate how denying Plaintiffs their 1993 PFDs actually advances that purpose in substance. Defendants have failed to demonstrate how processing three additional permanent fund dividends would pose a burden to the State, especially since under the 1993 PFD regime applications are being submitted earlier so as to give the State more time to process those applications and send out dividends before the end of the year. In short, denying Plaintiffs their 1993 PFDs advances no legitimate State interest whatsoever and thus affects a taking of their property. *See Nollan*, 483 U.S. at 838-841, 107 S.Ct. 3141, 97 L.Ed.2d at

690-92.

IV. The 1992 Amendments to AS 43.23.-005 Deny Plaintiffs Equal Protection Under the Law.

At pages 4-5 of Defendants' Memorandum, they appear to be correct in their contention that a Permanent Fund Dividend is an interest which receives only minimum scrutiny under equal protection analysis. *See State v. Anthony*, 810 P.2d 155, 158-59 (Alaska 1991). Nonetheless, the level of scrutiny applied still requires that the statute's objective be a legitimate one and that "the distinctions drawn bear a fair and substantial relationship to the statute's objective." *Id.* at 158-59.

As discussed previously, the purported purpose of the amendments to AS 43.23.005 is "to improve the efficiency of the program's operation." (Defendants' Memorandum at 5) As such this case is akin to *Herrick's Aero-*

Auto-Aqua Repair v. State, Department of Transportation and Public Facilities, 754 P.2d 1111 (Alaska 1988). In *Herrick's*, the Alaska Supreme Court held that "costs savings alone is not sufficient governmental objective under our equal protection analysis." *Id.* at 1114. Similarly, the Court held that claims of administrative efficiency and convenience are insufficient to pass constitutional muster under equal protection analysis. *Id.* at 1114-15. Moreover, as discussed previously, there is no indication that the 1992 amendments do indeed result in an increased administrative efficiency. *See id.* at 1114.

Again, the Defendants argument boils down to the illogical assertion that "[i]f persons arriving between January 1, 1992 and April 1, 1992, were made eligible, two classes of eligible citizens would be created: one year residents and eight month resi-

dents, which would surely offend the equal protection clauses. That also would, at a minimum, then cause persons who had previously been denied for failing the one year test to cry foul." (Defendants' Memorandum at 5 n.6-6 n.6) For one, it is not clear how there would be two such classes of eligible citizens created since persons who arrived between January 1, 1992 and April 1, 1992 would be one-year residents as of the one year anniversary of their arrival, which would be well-within the 1993 application period which runs from January 1, 1993 through June 30, 1993. Accordingly, persons who had previously failed to meet the one year test would have no basis to cry foul since persons such as the Plaintiffs in this case have clearly been one year residents under either version of the law.

CONCLUSION

For the reasons stated, the Defendants'

Motion for Summary Judgment should be denied, and the Plaintiffs' Motion for Summary Judgment should be granted.

Plaintiffs Underwood respectfully pray that the Court so order.

DATED this 9th day of April, 1993, at Fairbanks, Alaska.

LAW OFFICE OF ROBERT JOHN

/s/ Robert John
Robert John
Attorney for Plaintiffs

APPENDIX I

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiffs Underwood, by and through their counsel Robert John, and hereby submit their Reply to the Defendants' Opposition to Plaintiffs' Cross-Motion for Summary Judgment.

DISCUSSION

At pages 1-2 of the Defendants' Reply/Opposition Memorandum, the Defendants maintain that the *ex post facto* law prohibi-

tions in the United States and Alaska Constitutions apply to criminal or penal laws only. While the cases cited do indicate that under the United States Constitution *ex post facto* laws are limited to those which are of a criminal or penal nature, no authority is cited that the *ex post facto* prohibition found at Article I § 15 of the Alaska Constitution is likewise limited solely to criminal or penal laws. Rather, the Court is "free, and [it is] under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if [it finds] such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970). For the Court

to then hold that the *ex post facto* law prohibitions apply in a case such as this is entirely consistent with the Alaska Supreme Court's definition of an *ex post facto* law as one "passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relationships of such fact or deed." *Danks v. State*, 619 P.2d 720, 722 n.3 (Alaska 1980) (quotation and citation omitted).

At pages 2 through 4 of their Memorandum, the Defendants engage in what they purport to call a "vested rights" analysis and conclude that the Underwoods have no vested rights to a 1993 Permanent Fund Dividend (PFD). Contrary to the Defendants' contention, the Underwoods do indeed have a vested right to their 1993 PFDs.

"Vested property rights are protected against state action by the provisions of the Fourteenth Amendment of the

Constitution of the United States and by Sec. 7 of Art. I of our state constitution." *Norton v. Alcoholic Beverage Control Board*, 595 P.2d 1090, 1092 n.4 (Alaska 1985) (citing *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960)). A vested right is one which has already accrued or is in the process of accruing so as to fully ripen at a future date. *Bidwell*, 355 P.2d at 586 & n.5. A right which is thus vested cannot be taken away by statute. *Norton*, 695 P.2d at 1092-93.

At pages 2 through 3 of their Memorandum, the Defendants contend that the Underwoods cannot have a vested right since, the Defendants claim, no Alaskan "as yet has a right to a 1993 PFD; the legislature has not made the appropriation for the 1993 PFD . . . [which is] nothing more than a mere expectation; a glimmer in the eye of each prospective recipient." The Defendants

argument, however, is legally erroneous. Although the amount of the 1993 PFD may not yet have been determined or announced, the right to a 1993 PFD itself, whatever that final amount may be, has already vested in those who are legitimately entitled to the 1993 PFD. Moreover, while the Alaska legislature may not as yet have made an appropriation for the 1993 PFD, that amount has already largely been determined by statute and is not a matter of legislative whim or grace. *See* AS 43.23.025; AS 43.23.045.

At page 3 of the Defendants' Memorandum, they contend that the Underwoods' traveling from Texas and crossing the border and arriving in Alaska "led to nothing that would create a right to a PFD *at that time*." (emphasis by Defendants). The Defendants are correct that the fact that the Underwoods did indeed become residents of Alaska in March of 1992 did not, in and of itself,

entitle them to a 1993 PFD. Of course, to receive 1993 PFDs, the Underwoods would have needed to remain residents for the ensuing twelve months -- which they did. That is the basic point of vested rights analysis, that the Underwoods are entitled to continue with their course of action so as to fully ripen their rights to 1993 PFDs.

At pages 3 - 4 of their Memorandum, Defendants nonetheless contend that the 1992 amendments to AS 43.23.005 did not interfere with the Underwoods "settled expectations" and that the retroactive legislation is not "harsh and oppressive." Yet, as detailed in Mr. Underwood's previously submitted affidavit, the Underwoods acted in clear reliance upon the pre-amendment law and suffered substantial financial and other detriments by coming to Alaska -- at the time they did as opposed to two months later -- for the express purpose of being able to

qualify for 1993 PFDs. The Underwoods had settled expectations on what their entitlement would be at the end of their first year of Alaska residency and they, in fact, did fulfill the one-year residency requirement. Moreover, the case does not concern only one approximately $900 payment, but instead concerns three such payments, a sum of $2700 or more. A denial of such amounts is plainly harsh and oppressive to persons in the Underwoods' financial situation, especially when one considers the financial detriment which the Underwoods suffered by acting in reliance on the then-existing pre-amendment law.

At pages 4 - 6 of their Memorandum, the Defendants return to their vested rights/due process discussion and also discuss the closely related issue of estoppel. The Underwoods have discussed vested rights and due process previously in this Reply and

reiterate that discussion here.

The Defendants' estoppel argument mis-characterizes the Underwoods' position when the Defendants contend that "Plaintiffs are saying the only reason they came to Alaska was to reap the benefits of the PFD program." (Memorandum at 5) Contrary to the Defendants' contention, the Underwoods came to Alaska because they had previously purchased some land here and sincerely desired to make Alaska their permanent residence. The real issue is not the reason "why" but is rather the reason "when." As indicated in Mr. Underwood's affidavit, the sole reason that the Underwoods came to Alaska <u>when</u> they did, was so as to qualify for the 1993 PFD. Otherwise, they would have remained in Texas for at least two more months and Mr. Underwood would have earned the corresponding income and benefits from his long-standing job in Texas.

At pages 6 - 7 of their Memorandum, the Defendants contend that they could not have taken any property of the Underwoods since, the Defendants claim, they took only an "inchoate expectation." As discussed previously, however, the Underwoods' unquestionable and detrimental reliance upon the then-existing law gives rise to much more than an inchoate expectation. This is especially true when viewed in light of the Underwoods having indeed remained Alaska residents since their arrival. As Justice Brennan explained in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978), one measure of a violation of the Takings Clause is whether the government regulation frustrates distinct investment-backed expectations. *Id.*, 482 U.S. at 124-25, 127, 98 S.Ct. 2646, 57 L.Ed. 2d at 648-49, 650. As discussed, the Underwoods clearly intended

to become permanent Alaska residents and as such had every reasonable expectation that they would receive 1993 PFDs if they were Alaska residents on or before April 1, 1992, and they accordingly forewent opportunities in Texas and moved to Alaska at the precise time they did in order to qualify for their 1993 PFD's.

During the remainder of the Defendants' takings discussion, the Defendants acknowledge that they fail to meet the "substantially advance a legitimate state interest" test as set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987). As the State concedes:

> No one has ever asserted that denying the Plaintiffs their PFD advances anything.

(Memorandum at 7)

Moreover, the State's asserted rationale of administrative efficiency

leaves no doubt but that the 1992 amendments, especially as applied to the Underwoods, violate the equal protection component of the Takings Clause and deny the Underwoods equal protection as well. As the *Nollan* Court explained:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they have not contributed to it more than any other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed. 2d 1554, 80 S.Ct. 1563 (1960).

Nollan, 435 U.S. at 835 n.4, 107 S.Ct. 3141, 97 L.Ed.2d at 688 n.4. In this case, the Underwoods are no more responsible for any "administrative efficiency" problems which the State may have than are any other per-

sons who would apply for a PFD. Accordingly, it is unconstitutional for the State to single out persons such as the Underwoods to bear the brunt of achieving purported administrative efficiency. *Id.*; *see also DeLisio v. Alaska Superior Court*, 740 P.2d 437, 439 (Alaska 1987) ("The underlying intent of the [takings] clause is to insure that individuals are not unfairly burdened by disproportionately bearing the costs of projects intended to benefit the public generally.").

Furthermore, the State has failed to meet its burden of proof that a legitimate State interest is in fact actually advanced in substance by the amendment at issue. *See Nollan*, 483 U.S. at 834 & n.3, 107 S.Ct. 3141, 97 L.Ed. 2d at 687-88 & n.3. In this regard, takings analysis differs from that under traditional substantive due process and federal equal protection in that takings analysis heightens the scrutiny and

places the burden of proof on the government entity rather than on the individual. *See id.; see also Yee v. City of Escondido*, 112 S.Ct. 1522, 1530, 1532, 118 L.Ed. 2d 153, 167, 169 (1992); *Seawall Associates v. City of New York*, 542 N.E. 2d 1059, 1068, 544 N.Y.S. 2d 542, 551 (Ct. App. 1989), *cert. denied*, 493 U.S. 946, 110 S.Ct. 500, 107 L.Ed. 2d 503 (1989).[1] Indeed, the close regulatory means-ends nexus required by *Nollan* is akin to intermediate level equal protection scrutiny under Article I, §1 of the Alaska Constitution which "requires that

---

[1] The underlying premise arising from *Nollan* is that the substantial advancement of a legitimate State interest is a precondition to the valid exercise of the police power. *See Nollan*, 483 U.S. at 836-37, 839-41, 107 S.Ct. 3141, 97 L.Ed.2d at 689, 690-92. Thus, State actions may be struck down by the Court regardless of "the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated." *Yee*, 112 S.Ct. at 1532, 118 L.Ed.2d at 169.

the state's interest underlying the enactment by [sic] not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close." *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 633 (Alaska 1989). Under that test, enactments such as the 1992 PFD amendments which are substantially over- or under-inclusive do not pass constitutional muster. *Id.* at 634-35.

Furthermore, since this case concerns discrimination against persons who had recently exercised their rights to migrate to Alaska from other States, the applicable test is even more stringent than intermediate scrutiny and instead involves strict scrutiny. *See Hicklin v. Orbeck*, 565 P.2d 159, 162-63 (Alaska 1977), *reversed on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). "In addition to protecting persons against the erection of

actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." *Zobel v. Williams*, 457 U.S. 55, 60 n.6, 102 S.Ct. 2309, 72 L.Ed.2d 672, 677-78 n.6 (1982) (emphasis added) (Alaska Permanent Fund Dividend case). "[W]here the 'right to travel' is involved, [the] cases leave no doubt that it will trigger intensified equal protection scrutiny." *Zobel*, 457 U.S. at 66 n.1, 102 S.Ct. 2309, 72 L.Ed.2d at 681 n.1 (Brennan, J., joined by Marshall, Blackmun, and Powell, JJ., concurring). Thus, "those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare." *Id.*, 457 U.S. at 70, 102 S.Ct. 2309, 72 L.Ed.2d at 684 (Brennan, J., joined

by Marshall, Blackmun and Powell, JJ., concurring). As the Alaska Supreme Court explained:

> Durational residence requirements are subject to strict scrutiny under the equal protection clauses of the federal and state constitutions because they penalize those who have exercised their fundamental right of interstate migration.
>
> Under strict scrutiny, the law must be struck down unless the state can demonstrate that it is necessary to further a compelling state interest, and that is the least drastic means available to further that interest.

Hicklin, 565 P.2d at 162-63 (footnotes and citations omitted). Since the 1992 amendment does not pass even the lowest level of equal protection scrutiny, it follows *a fortiori* that the 1992 amendment is not among those "rare" cases which survive the rigors of strict scrutiny.

Again, even if the State's interest in administrative efficiency were a legitimate one, the State has failed to demonstrate in

substance how the exclusion of the Underwoods actually advances the State's interest. The State has, for this year only, extended the application period through its pre-amendment deadline of June 30. With the application period then being a full six months -- rather than the three month (April through June) period under the old law or the three month (January through March) period that will be applicable starting in 1994 under the new law -- the State's position logically makes no sense.

Moreover, the State has provided no studies or other substantive information to support its position. Indeed, it is doubtful that the State could ever support its position with any hard facts. Since the State processes 500,000 or more PFD applications annually, the additional burden associated with processing the Underwoods' application is non-existent. While, based on

conversations between the undersigned and the State's counsel, there may be several hundred persons in the Underwoods' situation, even if there were 5,000 such persons who have been denied their right to a Permanent Fund Dividend, that would be less than a one percent increase in the administrative burden so as to be *de minimis*. *Cf. Baker*, 471 P.2d at 402 ("It is said that by allowing a broad right to jury trial, too great a burden is imposed on the operation of government. But fears about the ramifications of constitutional decisions usually are not borne out in reality.").

At page 7 of the Defendants' Memorandum, they assert that since the Underwoods have not applied for a 1993 PFD, "there is nothing to deny." However, as indicated in the 1993 PFD application attached as Exhibit 1 to Mr. Underwood's Affidavit, the problem is that the Underwoods cannot prop-

erly complete the application without committing perjury. Such a choice is but a Hobson's choice, one which the State cannot constitutionally impose upon its citizens. *See Messerli v. Dept. of Natural Resources*, 768 P.2d 1112, 1122 (Alaska 1989). Instead the State has an overriding obligation to deal forthrightly and fairly with its citizens. *F.M.C. Stores Co. v. Borough of Morris Plains*, 495 A.2d 1313, 1317-18 N.J. (1985). "Its primary obligation is to comport itself with compunction and integrity" so that it must "turn square corners" when dealing with its citizens. *Id.*

At page 7 of their Memorandum, the Defendants characterize Plaintiffs' position as asserting that the "distinctions" effected by the 1992 amendments "bear a fair and substantial relationship to the statute's objectives." To the contrary, as discussed in the Underwoods' previous Memorandum and

in this Memorandum as well, the distinctions effected by the 1992 amendments plainly do not bear a fair and substantial relationship to the amendment's alleged objectives and thus do not satisfy even the lowest level of equal protection scrutiny. *See State v. Anthony*, 810 P.2d 155, 158-59 (Alaska 1991).

Finally, at pages 7-8 of their Memorandum, Defendants attempt to distinguish the closely analogous case of *Herrick's Aero-Auto-Aqua Repair v. State, Dept. of Transportation and Public Facilities*, 754 P.2d 111 (Alaska 1988). For one Defendants would distinguish *Herrick's* on the basis that "[t]he amendments to the PFD program were not based solely on cost savings, nor administrative convenience." (Memorandum at 7) Yet, the Defendants' attempted justification for the amendments is precisely that of cost savings and administrative expediency. While, as the Defendants contend, ad-

ministrative efficiency might result in some incidental benefits to all Alaskans, the same holds true of the airport-leasing practices and policies at issue in *Herrick's*.

Nor does the result change by the Defendants' last-gasp attempt to distinguish *Herrick's* as having "dealt with the *application* of departmental regulations as opposed to a statutory enactment." (Memorandum at 8) "[I]ndeed, the equal protection clause was designed to *protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency that is often characterized in the most praiseworthy legislation.*" *Isakson v. Rickey*, 550 P.2d 359, 365 (Alaska 1976) (emphasis added); *see also id.* at 362, 364 (the Court "will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard"; thus "[l]egislative leeway for

unexplained pragmatic experimentation is substantially narrowed" and laws passed "for the sake of administrative convenience" do not present a legitimate basis for drawing distinctions among persons for equal protection purposes).

The Defendants suggest in closing that "it would have been possible, on a one time basis, to permit applicants to achieve a one-year residency period, so long as it was completed within the application period for the 1993 PFD." (Memorandum at 8) Yet it is not even as difficult as that; rather, the State should simply have permitted PFD applicants to achieve a one-year residency, so long as the one-year residency was completed on or before April 1, 1993 -- three months prior to the end of the application period for the 1993 PFD and just as it would have been prior to the 1992 amendments. That is merely what the Constitution re-

quires.

CONCLUSION

For the reasons stated, the Court should grant Plaintiffs' Motion for Summary Judgment. The Underwoods respectfully pray that the Court so order.

DATED this 3rd day of May, 1993, at Fairbanks, Alaska.

LAW OFFICE ROBERT JOHN

By: /s/ Robert John
Robert John
Attorney for Plaintiffs Underwood

:eas

APPENDIX J

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Plaintiffs,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Defendants.*	Case No. 4FA-93-234 Civil

MOTION FOR RECONSIDERATION

COMES NOW the Plaintiffs Underwood, by and through their counsel Robert John, and pursuant to Civil Rule 77(k)(1)(i) and Civil Rule 77(k)(1)(iii) hereby move that the Court reconsider its May 25, 1993 decisions which denied the Plaintiffs' Motion for Summary Judgment and which granted the Defendants' Motion for Summary Judgment.

DISCUSSION

Concerning the equal protection chal-

lenge made by the Underwoods, the Court in rendering its decision did not consider the Alaska Supreme Court's equal protection discussion in *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1260-61 (Alaska 1980), wherein the Alaska Supreme Court clarified the basis for its decision in *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976), one of the cases previously relied upon by the Underwoods.

As the *Apokedak* Court explained, the basis for its decision in *Isakson* was that the cut-off date violated equal protection by keeping persons from qualifying for a pool of gear license holders from which one might obtain a limited entry permit. *See Apokedak*, 606 P.2d at 1260-61. The Court reasoned that while the gear license requirement itself bore a fair and substantial relation to the purposes of the legislation, the establishment of a cut-off date prior to

the effective date of the legislation -- which in effect prevented persons from being eligible to submit a permit application -- did not bear a fair and substantial relation to the purpose of the legislation as administered. *Id.* at 1259-61 & nn.12,13,14, and 17.

Analogously, in the Underwoods' case, while the streamlining of the administrative mechanism so as to increase efficiency and avoid applicant confusion might be a legitimate state interest, the one-time exclusion of bona fide Alaska residents who arrived in Alaska during the three-month period prior to the 1992 passage of the Permanent Fund Dividend (PFD) legislation at issue does <u>not</u> bear a <u>fair and substantial</u> relation to the purpose of the legislation. The relation between the exclusion and the purpose of the legislation is at best *de minimus*. This is especially true since the application period

for this year has on a one-time basis been extended to a six-month period to avoid any confusion which may arise from the 1992 amendments. Indeed, the exclusion of the Underwoods from the 1993 PFD program can only be described as arbitrary and unreasonable so as to violate due process as well. *See State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 632 n.12 (Alaska 1989); *see also United States ex rel. Siegal v. Follette*, 290 F.Supp. 632, 635 (S.D.N.Y. 1968) ("When a right is given by a state legislature, even though it is not a right protected by the federal constitution, the arbitraty denial of that right violates the Fourteenth Amendment.").

Moreover, the denial of 1993 PFDs to the Underwoods is directly contrary to the United States Supreme Court's decision *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985)

where the Court held that a state statute granting a property tax exemption only to those veterans who resided in the state before a certain date violated the equal protection guarantees of the Fourteenth Amendment. As the *Hooper* Court reasoned, "Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after [a certain date]." *Id.*, 472 U.S. at 623, 105 S.Ct. 2862, 86 L.Ed.2d at 496. "Neither the Equal Protection Clause, nor [the] Court's precedents, permit the State to prefer established resident[s] . . . over newcomers in the retroactive apportionment of an economic benefit." *Id*,. 472 U.S. at 623, 105 S.Ct. 2862, 86 L.Ed.2d at 497.

CONCLUSION

For the reasons stated, the Court should grant the Underwoods' Motion for

Reconsideration. The Underwoods respectfully pray that the Court so order.

DATED this 4th day of June, 1993, at Fairbanks, Alaska.

LAW OFFICE OF ROBERT JOHN

By /s/ Robert John
Robert John
Attorney for Plaintiffs

APPENDIX K

THE SUPREME COURT OF THE STATE OF ALASKA

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Appellants,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Appellees.*	Supreme Court No. S-5802 Civil Merit Appeal Superior Court # 4FA-93-234 Civil

MERIT APPEAL FROM THE MAY 26, 1993
FINAL JUDGMENT OF THE SUPERIOR COURT
THE HONORABLE MARY E. GREENE

OPENING BRIEF OF APPELLANT

LAW OFFICE OF ROBERT JOHN

By: /s/ Robert John
Robert John
Attorney for Appellants Underwood
ABA #8911069
709 Fourth Avenue
Fairbanks, AK 99701
(907) 452-4454

Filed in the Supreme Court
of the State of Alaska
this 21st day of December, 1993.

By: /s/ Teresa High
Teresa High, Deputy Clerk

* * * *

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the 1992 Permanent Fund Dividend (PFD) amendments deny the Underwoods equal protection and opportunities under the law.

2. Whether the 1992 PFD amendments constitute an *ex post facto* law with respect to the Underwoods.

3. Whether the 1992 PFD amendments deny the Underwoods due process of law.

4. Whether the 1992 PFD amendments effect an unconstitutional taking of the Underwoods' property.

5. Whether the State is estopped from denying the Underwoods their 1993 PFDs.

* * * *

ARGUMENT

I. The 1992 Permanent Fund Dividend (PFD) Amendments Deny the Underwoods Equal Protection and Opportunities Under the Law.

Under Article I, § 1 of the Alaska Constitution and the Fourteenth Amendment to the United States Constitution, the Underwoods are entitled to equal protection and opportunities under the law. *See State, Dept. of Revenue v. Cosio*, 858 P.2d 621, 626 (Alaska 1993).

A Permanent Fund Dividend is an interest which ordinarily receives only minimum scrutiny under both State and federal equal protection analysis. *Id.* at 626-29; *State v. Anthony*, 810 P.2d 155, 158-59 (Alaska 1991). Minimum scrutiny under federal equal protection analysis requires the State to "show that the challenged law is rationally related to the attainment of a legitimate state interest." *Cosio*, 858 P.2d at 626.

However, since "Alaska's equal protection clause is more protective of individual rights than the federal equal protection clause," *Anthony*, 810 P.2d at 157, the level of scrutiny applied under the Alaska Constitution requires that the statute's objective be a legitimate one and that "the distinctions drawn bear a fair and substantial relationship to the statute's objective." *Id.* at 158-59.

The purported purpose of the 1992 amendments to AS 43.23.005 is "to improve the efficiency of the program's operation." (R. 13) As such, this case is akin to *Herrick's Aero-Auto-Aqua Repair v. State, Department of Transportation and Public Facilities*, 754 P.2d 1111 (Alaska 1988). In *Herrick's*, this Court held that "costs savings alone is not a sufficient governmental objective under our equal protection analysis." *Id.* at 1114. Similarly, the Court held that claims

of administrative efficiency and convenience are insufficient to pass constitutional muster under equal protection analysis. *Id.* at 1114-15. Moreover, there is no indication that the 1992 amendments do indeed result in increased administrative efficiency.

Even if the State's interest in administrative efficiency were a legitimate one, the State has failed to demonstrate in substance how the exclusion of the Underwoods actually advances the State's interest. For calendar year 1993 only, the State went so far as to extend the application period through its pre-amendment deadline of June 30. With the application period then being a full six months -- rather than the three-month (April through June) period under the old law or the three-month (January through March) period that will be applicable starting in 1994 under the new law -- the State's

position logically makes no sense.

As mentioned, the State has provided no studies or other substantive information to support its position. Indeed, it is doubtful that the State could ever support its position with any hard facts. Since the State processes 500,000 or more PFD applications annually, the additional burden associated with processing the Underwoods' applications is non-existent. While there may be several hundred persons in the Underwoods' situation, even if there were 5,000 such persons who have been denied their right to a Permanent Fund Dividend, that would be less than a one-percent increase in the administrative burden and would thus be *de minimis*. *Cf. Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970) ("It is said that by allowing a broad right to jury trial, too great a burden is imposed on the operation of government. But fears about

the ramifications of constitutional decisions usually are not borne out in reality.").

The State may contend that this case is distinguishable from *Herrick's* because *Herrick's* "dealt with the *application* of departmental regulations as opposed to a statutory enactment." (R. 50) Yet, "the equal protection clause was designed to *protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency that is often characterized in the most praiseworthy legislation.*" *Isakson v. Rickey*, 550 P.2d 359, 365 (Alaska 1976) (emphasis added); *see also id.* at 362, 364 (the Court "will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard"; thus, "[l]egislative leeway for unexplained pragmatic experimentation is substantially narrowed" and

laws passed "for the sake of administrative convenience" do not present a legitimate basis for drawing distinctions among persons for equal protection purposes).

The Court's decision in *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255 (Alaska 1980) is illustrative. In *Apokedak*, the Court clarified the basis for its decision in *Isakson*, *supra*. *See Apokedak*, 606 P.2d at 1260-61. As the Court explained, the basis for its decision in *Isakson* was that the cut-off date violated equal protection by keeping persons from qualifying for a pool of gear-license holders from which one might obtain a limited entry permit. *See Apokedak*, 606 P.2d at 1260-61. The Court reasoned that while the gear license requirement itself bore a fair and substantial relation to the purposes of the legislation, the establishment of the cut-off date prior to the effective date of the

legislation -- which in effect prevented persons from being eligible to submit a permit application -- did not bear a fair and substantial relation to the purpose of the legislation as administered. *Id.* at 1259-61 & nn.12, 13, 14, and 17.

Likewise, in the Underwoods' case, while the streamlining of the administrative mechanism so as to increase efficiency and avoid applicant confusion might be a legitimate state interest, the one-time exclusion of bona fide Alaskan residents who arrived in Alaska during the three-month period prior to the 1992 passage of the PFD legislation at issue does not bear a fair and substantial relation to the purpose of the legislation. The relation between the exclusion and the purpose of the legislation is at best *de minimis*. This is especially true since the application period during 1993 was, on a one-time basis, extended to

a six-month period to avoid any confusion which may arise from the 1992 amendment. Indeed, the exclusion of the Underwoods from the 1993 PFD program can only be described as arbitrary and unreasonable so as to violate due process as well. *See State v. Enserch Alaska Construction*, 787 P.2d 624, 632 n.12 (Alaska 1989); *see also United States ex rel. Siegal v. Follette*, 290 F.Supp. 632, 635 (S.D. N.Y. 1968) ("When a right is given by a state legislature, even though it is not a right protected by the federal constitution, the arbitrary denial of that right violates the Fourteenth Amendment.").

The Underwoods stand in stark contrast to the individuals in *Cosio* who were illegal aliens seeking Permanent Fund Dividends despite their unlawful presence in Alaska. *See* 858 P.2d at 623. In rejecting the Cosios' federal and state equal protection challenges in view of the three main purposes of

the PFD program, this Court explained:

> Compliance with the law is a legitimate consideration when the legislature considers entitlement to public funds. Thus, a regulation distinguishing between law-abiding and law-breaking state residents, and rewarding the former, is rationally related to the purpose of equitably distributing income from the permanent fund.

Cosio, 858 P.2d at 627; *see also id.* at 629. There is nothing equitable however, in denying PFDs to law-abiding, lawfully-present Alaskan residents such as the Underwoods.

With respect to the other two purposes addressed by the *Cosio* Court, recognizing the Underwoods' rights to their PFDs is consistent with those purposes. Unlike the Cosios, who lacked the legal ability to remain permanently in Alaska and thus could not meaningfully intend to remain Alaska residents, and who could not vote or otherwise legally involve themselves with the

administration of the PFD program, *id.* at 628, the Underwoods are full Alaskan citizens who have meaningfully expressed their intent to remain residents of Alaska, and who have, or upon attaining the proper age will have, the right to vote and to otherwise make their voices known in regards to the administration of the PFD program.

Furthermore, since this case concerns discrimination against persons who had recently exercised their rights to migrate to Alaska from other States, the applicable test involves strict scrutiny. *See Hicklin v. Orbeck*, 565 P.2d 159, 162-63 (Alaska 1977), *reversed on other grounds*, 437 U.S. 518 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, *protects new residents of a state from being disadvan-*

taged because of their recent migration or from being otherwise treated differently from longer term residents." *Zobel v. Williams*, 457 U.S. 55, 60 n.6, 102 S.Ct. 2309, 72 L.Ed.2d 672, 677-78 n.6 (1982) (emphasis added) (Alaska Permanent Fund Dividend case). "[W]here the 'right to travel' is involved, [the] cases leave no doubt that it will trigger intensified equal protection scrutiny." *Zobel*, 457 U.S. at 66 n.1, 102 S.Ct. 2309, 72 L.Ed.2d at 681 n.1 (Brennan, J., joined by Marshall, Blackmun, and Powell, JJ., concurring). Thus, "those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare." *Id.*, 457 U.S. at 70, 102 S.Ct. 2309, 72 L.Ed.2d at 684 (Brennan, J., joined by Marshall, Blackmun, and Powell, JJ., concurring). As this Court explained:

Durational residence requirements

> are subject to strict scrutiny under the equal protection clauses of the federal and state constitutions because they penalize those who have exercised their fundamental right of interstate migration.
>
> Under strict scrutiny, the law must be must be struck down unless the state can demonstrate that it is necessary to further a compelling state interest and that it is the least drastic means available to further that interest.

Hicklin, 565 P.2d at 162-63 (footnotes and citations omitted). Since the 1992 amendment does not even pass the lowest level of equal protection scrutiny, it follows *a fortiori* that the 1992 amendment is not among those "rare" cases which survive the rigors of strict scrutiny.

Moreover, the denial of the Underwoods' 1993 PFDs is directly contrary to the United States Supreme Court's decision in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) where

the Court held that a state statute granting a property tax exemption only to those veterans who resided in the state before a certain date violated the equal protection guarantees of the Fourteenth Amendment. As the *Hooper* Court reasoned, "Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after [a certain date]." *Id.*, 472 U.S. at 623, 105 S.Ct. 2862, 86 L.Ed.2d at 496. "Neither the Equal Protection Clause nor [the] Court's precedents, permit the State to prefer established resident[s] . . . over newcomers in the retroactive apportionment of an economic benefit." *Id.*, 472 U.S. at 623, 105 S.Ct. 2862, 86 L.Ed.2d at 497.

* * * *

III. The 1992 PFD Amendments Deny the Underwoods Due Process of Law.

Unquestionably, the Underwoods came to Alaska in detrimental reliance upon AS 43.2-3.005 as it existed prior to and immediately after the Underwoods' arrival in Alaska. Indeed, the Underwoods came to Alaska at the time which they did specifically so as to comply with the provisions of AS 43.23.005, and thereby suffered the detriment of dealing with the Alaskan winter as they commenced to build their home, and moreover incurred substantial lost income in reliance upon the statute. In cases such as the Underwoods', where persons have acted in good faith based upon existing law so as to conform their conduct with that law, subsequent changes in that law which make their conduct nonconforming have been analyzed under the doctrine of vested rights.

In *Nemmers v. City of Dubuque*, 716 F.2d 1194 (8th Cir. 1983), the court held that evidence of significant expenditures by the

individual who met the "use" requirement of the non-conforming use doctrine so as to give the individual a vested right in the law as it existed on the date of his conduct. Likewise, in *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), the court noted that purchasing property coupled with additional evidence of reliance on the existing law was sufficient to establish a property interest in the law as it existed on the date of the conduct constituting the reliance.

"Vested property rights are protected against state action by the provisions of the Fourteenth Amendment of the Constitution of the United States and by Sec. 7 of Art. I of our state constitution." *Norton v. Alcoholic Beverage Control Board*, 595 P.2d 1090, 1092 n.4 (Alaska 1985) (citing *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960)).

A vested right is one which has already accrued or is in the process of accruing so as to fully ripen at a future date. *Bidwell*, 355 P.2d at 586 & n.5. A right which is thus vested cannot be taken away by statute. *Norton*, 695 P.2d at 1092-93. Accordingly, since the Underwoods' rights to 1993 PFDs accrued upon their arrival subject only to their continuing residence, which they have since established, the 1992 amendments to AS 43.23.005 deprive the Underwoods of property without due process of law. The concerns of fundamental fairness and just treatment which underlie Alaska's Due Process Clause require that the Underwoods receive their 1993 PFDs. *See Thorne v. Department of Public Safety*, 774 P.2d 1326, 1329-31 (Alaska 1989).

IV. The 1992 PFD Amendments Effect an Unconstitutional Taking of the Underwoods' property.

Article I, § 18 of the Alaska Constitution and the Fifth Amendment to the United States Constitution protect an individual against the unconstitutional taking of his or her property. *Ehrlander v. State, Department of Transportation and Public Facilities*, 797 P.2d 629, 633 (Alaska 1990). A taking of property rights occurs where government action deprives a person of the economic advantages of ownership, *see id.*, or where government action does not substantially advance a legitimate state interest, *see Nollan v. California Coastal Commission*, 480 U.S. 825, 834, 107 S.Ct. 3141, 97 L.Ed.2d 677, 687 (1987).

In the Underwoods' case, the 1992 amendments to AS 43.23.005 plainly deprived the Underwoods of the economic advantage of their 1993 Permanent Fund Dividends. Moreover, even if one assumes for the sake of argument that the asserted purpose of the

amendments, that of improving the efficiency of the PFD program's operation, is a legitimate one, the State has nonetheless failed to demonstrate how denying the Underwoods their 1993 PFDs actually advances that purpose in substance. The State has failed to demonstrate how processing three additional PFDs would pose a burden to the State, especially since under the 1993 PFD regime, applications were allowed to be submitted earlier so as to give the State more time to process those applications and send out dividends before the end of the year. In short, denying the Underwoods their 1993 PFDs advances no legitimate State interest whatsoever and thus effects a taking of their property. *See Nollan*, 483 U.S. at 838-41, 107 S.Ct. 3141, 97 L.Ed.2d at 690-92.

The burden is on the State to prove that a legitimate State interest is actually

advanced in substance by the amendment at issue. *See Nollan*, 483 U.S. at 834 & n.3, 107 S.Ct. 3141, 97 L.Ed.2d at 687-88 & n.3. In this regard, takings analysis differs from that under traditional substantive process and federal equal protection in that takings analysis heightens the scrutiny and places the burden of proof on the government entity rather than on the individual. *See id.*; *see also Yee v. City of Escondido*, 112 S.Ct. 1522, 1530, 1532, 118 L.Ed.2d 153, 167, 169 (1992); *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068, 544 N.Y.S.2d 542, 551 (Ct. App. 1989), *cert. denied*, 493 U.S. 946, 110 S.Ct. 500, 107 L.Ed.2d 503 (1989).[1] Indeed, the close

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[1] The underlying premise arising from *Nollan* is that the substantial advancement of a legitimate State interest is a precondition to the valid exercise of the police power. *See Nollan*, 483 U.S. at 836-37, 839-41, 107 S.Ct. 3141, 97 L.Ed.2d at 689, 690-92. Thus, State actions may be struck down by the Court regardless of "the extent

regulatory means-ends nexus required by *Nollan* is akin to the intermediate equal protection scrutiny under Article I, § 1 of the Alaska Constitution which "requires that the state's interests underlying the enactment [be] not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close." *Enserch Alaska Construction, supra*, 787 P.2d at 633. Under that test, enactments such as the 1992 PFD amendments, which are substantially over- or under- inclusive, do not pass constitutional muster. *Id.* at 634-35. As the State has conceded, "No one has ever asserted that denying the [Underwoods] their PFD advances anything." (R. 49)

As Justice Brennan explained in *Penn*

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to which petitioners are deprived of the economic use of their particular piece of property or the extent to which these particular petitioners are compensated." *Yee*, 112 S.Ct. at 1532, 118 L.Ed.2d at 169.

Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), a violation of the Takings Clause may also be found where the government regulation frustrates distinct investment-backed expectations. *Id.*, 482 U.S. at 124-25, 127, 98 S.Ct. 2646 57 L.Ed.2d at 648-49, 650. As discussed, the Underwoods clearly intended to become permanent Alaska residents and, as such, had every reasonable expectation that they would receive their 1993 PFDs if they were Alaska residents on or before April 1, 1992, and they accordingly forewent opportunities in Texas and moved to Alaska at the precise time they did in order to qualify for their 1993 PFDs.

Moreover, the State's asserted rationale of administrative efficiency leaves no doubt but that the 1992 amendments, especially as applied to the Underwoods, violate the equal protection component of the Tak-

ings Clause and deny the Underwoods equal protection as well. As the *Nollan* Court explained:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they have not contributed to it more than any other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S.Ct. 1563 (1960).

Nollan, 435 U.S. at 835 n.4, 107 S.Ct. 3141, 97 L.Ed.2d at 688 n.4. In this case, the Underwoods are no more responsible for any "administrative efficiency" problems which the State may have than are any other persons who would apply for a PFD. Accordingly, it is unconstitutional for the State to single out persons such as the Underwoods to

bear the brunt of achieving purported administrative efficiency. *Id.*; *see also DeLisio v. Alaska Superior Court*, 740 P.2d 437, 439 (Alaska 1987) ("The underlying intent of the [takings] clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the public generally.").

CONCLUSION

For the reasons stated, the decisions of the trial court must be reversed and the Underwoods must receive their 1993 Permanent Fund Dividends. The Underwoods respectfully pray that the Court so order.

APPENDIX L

THE SUPREME COURT OF THE STATE OF ALASKA

CHARLES E. UNDERWOOD, JR., SUSIE G. UNDERWOOD, AND ANTHONY C. UNDERWOOD, *Appellants,* v. STATE OF ALASKA, GOVERNOR WALTER J. HICKEL AND DEPARTMENT OF REVENUE, *Appellees.*	Supreme Court No. S-5802 4FA-93-234 Civil

PETITION FOR REHEARING

The Appellants Underwood hereby petition the Court for rehearing of the Court's Opinion No. 4124 dated September 30, 1994. Rehearing is sought concerning the Equal Protection discussion at pages 4-9 of the Court's Opinion pursuant to Appellate Rule 506(a)(1)-(2) in that the Court has misapplied or failed to consider a decision or principle directly controlling and has overlooked or misconceived a material proposition of law.

In addition, rehearing is sought concerning the Estoppel discussion at pages 12-13 of the Court's Opinion pursuant to Ap-

pellate Rule 506(a)(1)-(2) in that the Court has overlooked or failed to consider a decision or principle directly controlling and has misconceived a material fact in the case.

Finally, rehearing is sought with respect to the Court's award of attorney's fees and costs to the Appellees pursuant to Appellate Rule 506(a)(1) in that the Court has overlooked or failed to consider a decision or principle directly controlling.

DISCUSSION

I. Equal Protection.

Even assuming the legitimacy of the alleged purposes of the challenged legislation--to improve administrative efficiency and consumer understanding--the fact remains that the State has put forth no evidence whatsoever to demonstrate that the challenged legislation advances those goals in substance and not merely hypothetically or speculatively. While, as the Court notes at page 5 of its Opinion, the moving of the qualifying date to coincide with the calendar year purportedly gives the State three additional months to process applications, the point remains that no such advantage was gained in 1993 because the State extended

the application period through June of 1993. Similarly, the State has failed to demonstrate that the challenged legislation decreased public confusion and date-related errors in 1993. Certainly, no such advantage was realized in the Underwoods' case since they were well aware of the dividend requirements prior to and upon their arrival in Alaska. As such, the challenged legislation is over-inclusive in that it penalizes the Underwoods and the many others similarly situated who well understood the pre-existing requirements for applying for 1993 PFDs -- while, as a result of the extended application period in 1993, the law simply failed to improve efficiency and accuracy in administering the PFD program. Likewise, the challenged legislation is under-inclusive on its face since the legislation penalizes only those such as the Underwoods who had recently exercised their constitutional right to travel.

The Court appears to incorrectly state the test as being whether the legislation "interferes with [the Underwoods'] right to travel, thereby implicating strict scrutiny analysis." (Opinion at 5 n.2) (emphasis added). The Court's analysis here conflicts

with its analysis in *State v. Adams*, 522 P.2d 1125 (Alaska 1974) and in the two United States Supreme Court decisions discussed in *Adams*, *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) and *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). *See Adams*, 522 P.2d at 1126. The holding of these cases is that "durational residency laws in general penalize the fundamental right of interstate travel" so that "no actual deterrence to interstate migration need be demonstrated to effectuate the compelling state interest test." *Adams*, 522 P.2d at 1126. Under that test, the "only durational residency requirements that will be countenanced are those which are absolutely necessary for administrative purposes." *Adams*, 522 P.2d at 1126 (quoting *State v. Van Dort*, 502 P.2d 453, 454 (Alaska 1972)).

Just as the United States Supreme Court in *Shapiro* "struck down a one-year residency requirement conditioning the receipt of welfare benefits," *Adams*, 522 P.2d at 1126, so the Court should strike down the challenged legislation which penalized the Underwoods for having recently exercised their right to interstate travel and which,

on its face and as applied, imposed a durational and date-specific residency requirement by denying the Underwoods their PFDs even though they had been Alaska residents for more than nine months at the end of the newly-created "qualification" period and were Alaska residents for more than one year and three months by the end of the period during which persons were allowed to apply for 1993 PFDs.

The need for strict scrutiny in the Underwoods case is discussed at pages 13-14 of the Underwood's Opening Brief. In addition to the cases there cited, the United States Supreme Court has more recently explained:

> Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases.... The analysis in all of these cases, however, is informed by the same guiding principle--the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from similarly situated residents.... [R]egardless of the label we place on our analysis--right to migrate or equal protection--once we find a burden on the right to migrate, the standard of review is the same. Laws which burden that right must be necessary to further

a compelling state interest.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903-05 & n.4, 106 S.Ct. 2317, 90 L.Ed.2d 899, 905-07 & n.4 (1986).

The evolving principles of equality embodied in the Equal Protection Clause require that certain classifications be viewed as *potentially* discriminatory, and when history reveals systematic unequal treatment, more searching judicial inquiry is warranted. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-42, 105 S.Ct. 3249, 87 L.Ed.2d 313, 320-21 (1985). Thus, the Court must engage in heightened scrutiny of challenged legislation where a "suspect" or "quasi-suspect" class exists. *Lyng v. Castillo*, 477 U.S. 635, 639, 106 S.Ct. 2727, 91 L.Ed.2d 527, 533 (1986). In making this determination, the Court should consider whether, as a historical matter, the group or class at issue has been subjected to discrimination, whether the group or class exhibits obvious, immutable, or distinguishing characteristics that define it as a discrete group or class, and whether the group is a minority or is otherwise politically powerless. *Id.*

A parade of cases has undoubtedly made this Court well aware that there is a distinct historical tendency for Alaskans to set hierarchies based upon the length of an individual's Alaskan residence, and to otherwise discriminate against recent arrivals to our great state. *See e.g. Schafer v. Vest*, 680 P.2d 1169 (Alaska 1984); *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *reversed on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); *State v. Wylie*, 516 P.2d 142 (Alaska 1973). Moreover, those who have recently moved to a state, in addition to being small in number, are a diverse and defuse group of people who lack both the brute political muscle and the political cohesiveness to assert themselves in the legislative forum in any meaningful fashion. Indeed, given the timing of the challenged legislation and the class of persons it discriminated against, it is unlikely that any members of the class even had the opportunity to exercise the right to vote prior to being subjected to the discrimination at issue. Whatever may have been the shortcomings of Alaska's PFD program as originally enacted, at least that program did not embody the invidious dis-

crimination evidenced in the durational and date-specific residency requirement imposed upon the Underwoods but instead permitted a first-year resident to receive at least a pro-rata share of the PFD. *See Zobel v. Williams*, 458 U.S. 55, 58-59 & n.4, 102 S.Ct. 2309, 72 L.Ed.2d 672, 676-77 & n.4 (1982).

II. Estoppel.

Although the Court concludes that the Underwoods took a "calculated risk" by moving to Alaska in March rather than May of 1992 and that the State by no means encouraged such action or guaranteed that the Underwoods would qualify for a 1993 PFD if they became Alaska residents on or before April 1, 1992, the fact remains that the law in effect at the time encouraged the Underwoods to act as they did and the Underwoods were merely trying to conform their conduct to the law as the State specifically informed the Underwoods in a letter dated June 24, 1991 (Exhibit 1) and in Charles Underwood's other contacts with PFD personnel. (R. 38) Had the Underwoods encountered unexpected car trouble, been in an accident, ran short of funds, or otherwise been delayed in their journey from Texas to Alaska

so as to miss the April 1, 1992 deadline, then they could truly be said to have engaged in a "calculated risk" which did not pay off. In contrast, the Underwoods were entitled to rely upon the law as it existed and upon the State's representations of the need to be in Alaska by April 1 and of the consequences of arriving by that date. *Mortvedt v. State, Department of Natural Resources*, 585 P.2d 1140 (Alaska 1993).

III. Attorney's Fees and Costs.

The Underwoods plainly indicated that they were bringing this case pursuant to 42 U.S.C. § 1983. (R. 22) Accordingly, since the Underwoods' case is meritorious and not frivolous, no costs or attorney's fees should be awarded to the Appellees. *Diedrich v. City of Ketchikan*, 805 P.2d 362, 370 (Alaska 1991).

CONCLUSION

For the reasons stated, the Court should grant rehearing and hold that the Underwoods are entitled to their 1993 PFDs. The Underwoods respectfully pray that the Court so order.

Dated at Fairbanks, Alaska this 10th day of October, 1994.

LAW OFFICE OF ROBERT JOHN
By /s/ Robert John
Robert John
Attorney for Appellants

EXHIBIT 1

WALTER J. HICKEL, GOVERNOR

STATE OF ALASKA
DEPARTMENT OF REVENUE
OFFICE OF THE COMMISSIONER

Address: P. O. Box S
Juneau, Alaska 99811
Phone: (907) 465-2300
Telefax: (907) 465-2389

June 24, 1991

Woody Underwood
P. O. Box 79657
Saginaw, TX 76179

Dear Mr. Underwood:

This is in response to your May 6, 1991 letter to Governor Hickel regarding the Alaska Permanent Fund Dividend eligibility requirements.

The annual eligibility period for Permanent Fund Dividend begins April 1st and continues through the following March 31st. Because you apparently were not a resident prior to April 1 of this year, you would not be eligible for a 1992 PFD.

In order to be eligible for a 1993 Alaska Permanent Fund Dividend you would have to:

1) establish Alaskan residency on or before April 1, 1992;

2) remain a resident for the entire eligibility year;

3) file an application between April 1, 1992 and June 30, 1992; and

4) be a resident at the time of filing and have the intent to remain a resident.

If you would like any additional PFD eligibility information, you may contact the Juneau Dividend Information Office at (907) 465-2326 or write to them at P. O. Box S-0464, Juneau, AK 99811.

Sincerely,

/s/ Darrel Rexwinkel
Darrel Rexwinkel
Deputy Commissioner

DR:bro
CTS #91155HDC0039

cc: Thomas C. Williams, Director
Permanent Fund Dividend Division

APPENDIX M

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

DENNIS SHELL GILKEY, MARGIE LORETTA WHITE, KYLE LEE GILKEY, JOHN JULSING, SANDRA J. JULSING, JACK JULSING, PATRICIA JULSING, JUDY E. KESLER, NIKOLE KESLER, LINZY KESLER, EILEEN L. NICKOLOFF, MARVIN C. PAPENFUSS, LINDA C. PAPENFUSS, CORY M. PAPENFUSS, LUCAS A. PAPENFUSS, MARK SHRYOCK, LAURIE CUMMINS-SHRYOCK, ROBERT L. WOOD, GINGER F. WOOD, JENNIFER F. WOOD, MISTY D. WOOD, HARLEY J. J. WOOD, CHARLOTTE R. WOOD, and all other persons similarly situated,

Plaintiffs,

vs.

STATE OF ALASKA, DEPARTMENT OF REVENUE, and DARREL REXWINKEL, COMMISSIONER OF THE STATE OF ALASKA, DEPARTMENT OF REVENUE,

Defendants.

Case No. 4FA-94-758 Civil

CLASS-ACTION COMPLAINT

Plaintiffs complain and allege against Defendants as follows:

1. Plaintiffs became residents of the State of Alaska at various times from January 1, 1992 through March 31, 1992.

2. The class of which Plaintiffs are representative under Alaska Civil Rule 23 includes all persons who became residents of the State of Alaska from January 1, 1992 through March 31, 1992, whether by migration, by birth, or otherwise.

3. Plaintiffs and the class of persons of which Plaintiffs' are representative (hereinafter individually and collectively referrred to as Plaintiffs) are entitled to receive 1993 Alaska Permanent Fund Dividends (PFDs) from the State of Alaska, Department of Revenue.

4. Plaintiffs would have already received their 1993 PFDs but for the fact that Plaintiffs became residents of the

State of Alaska from January 1, 1992 through March 31, 1992.

* * * *

33. The 1992 amendments to AS 43.23.-005 are illegal and unconstitutional in violation of the Alaska Statutes, the Alaska Constitution, the principles of estoppel, the United States Constitution, and 42 U.S-.C. § 1983. Accordingly, under 42 U.S.C. § 1983 and AS 22.10.020, Plaintiffs are entitled to declaratory relief holding the 1992 amendments to AS 43.23.005 to be null and void with respect to Plaintiffs, and Plaintiffs are further entitled to declaratory and injunctive relief directing Defendants to promptly pay to Plaintiffs such PFDs and interest and other amounts to which Plaintiffs are entitled, and further directing Defendants to establish and implement an effective mechanism whereby unnamed persons in Plaintiffs' class will be ascertained,

identified, and actually notified of their rights to apply for 1993 PFDs at this time and whereby such persons will be permitted ample time after such notice in which to submit their applications for 1993 PFDs.

WHEREFORE, Plaintiffs respectfully pray that the Court enter an order certifying this case as a class action and that the Court enter judgment in favor of Plaintiffs and against Defendants, awarding Plaintiffs damages in the amount of the 1993 PFDs which Plaintiffs would have already received but for the 1992 amendments to AS 43.3.005, plus interest thereon at the legal rate from the date Defendants first began distributing 1993 PFDs, plus costs and attorney's fees, plus the appropriate declaratory and injunctive relief against Defendants to insure that Plaintiffs and all other persons in the class which Plaintiffs represent are identified and ascertained by Defendants and are

then given ample time to apply for their 1993 PFDs, and for such other relief as the Court deems just and equitable in the premises.

DATED this 31st day of March, 1994.

LAW OFFICES OF ROBERT JOHN

/s/ Robert John
Robert John
Attorney for Plaintiffs

:ml

APPENDIX N

DENNIS SHELL GILKEY, MARGIE LORETTA WHITE, KYLE LEE GILKEY, JOHN JULSING, SANDRA J. JULSING, JACK JULSING, PATRICIA JULSING, JUDY E. KESLER, NIKOLE KESLER, LINZY KESLER, EILEEN L. NICKOLOFF, MARVIN C. PAPENFUSS, LINDA C. PAPENFUSS, CORY M. PAPENFUSS, LUCAS A. PAPENFUSS, MARK SHRYOCK, LAURIE CUMMINS-SHRYOCK, ROBERT L. WOOD, GINGER F. WOOD, JENNIFER F. WOOD, MISTY D. WOOD, HARLEY J. J. WOOD, CHARLOTTE R. WOOD, and all other persons similarly situated,

Plaintiffs,

vs.

STATE OF ALASKA, DEPARTMENT OF REVENUE, and DARREL REXWINKEL, COMMISSIONER OF THE STATE OF ALASKA, DEPARTMENT OF REVENUE,

Defendants.

Case No. 4FA-94-758 Civil

ORDER GRANTING MOTION TO STAY PROCEEDINGS

The Court, having duly considered the matters presented and being fully informed

in the premises, hereby adjudges, orders and decrees that Plaintiffs' Motion to Stay Proceedings be and is GRANTED. Accordingly, the State of Alaska's pending Motion for Summary Judgment is hereby deemed withdrawn and no further proceedings shall be had in this matter until the Alaska Supreme Court's disposition of the Petition for Rehearing in Underwood v. State of Alaska, Alaska Supreme Court Op. No. 4124 (September 30, 1994) and any subsequent Petition for Writ of Certiorari to the United States Supreme Court. Upon the conclusion of such proceedings or if no United States Supreme Court review is sought in the Underwood case, the parties shall promptly notify the Court so that a status hearing may be set.

DATED this 24th day of October, 1994, at Fairbanks, Alaska.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
SUPERIOR COURT JUDGE

APPENDIX O

ALASKA DEPARTMENT OF LABOR

Research and Analysis
P. O. Box 25501
Juneau, AK 99802-5501

Federal State Co-op for Population Estimates (FSCPE)
Federal State Co-op for Population Projections (FSCPP)

FAX: (907)465-4506 TELEPHONE: (907)465-6029
DATE: 6/18/94 TIME: 10:40

FROM: Greg Williams, State Demographer

Table 1.2
Migrants To and From Alaska, 1980-1991.

July1 to July1	Net Migrants	In Migrants	Out Migrants	Gross Migrants
1980-81	6,326	47,210	40,884	88,094
1981-82	20,992	60,035	39,043	99,078
		* * *		
1990-91	7,101	54,006	46,905	100,911
1991-92	7,124	55,286	48,140	103,426
Migration Rate (% Of Population)				
1980-81	1.48	11.1	9.6	20.6
1981-82	4.67	13.4	8.7	22.1
		* * *		
1990-91	1.26	9.6	8.3	18.0
1991-92	1.23	9.6	8.3	17.9

Alaska Department of Labor, Research & Analysis Demographics Unit

APPENDIX P

PER CAPITA DIVIDENDS SINCE INCEPTION OF ALASKA PERMANENT FUND DIVIDEND (CALENDAR YEARS)

1982	$1,000
1983	386
1984	331
1985	404
1986	556
1987	708
1988	827
1989	873
1990	953
1991	931
1992	916
1993	949
1994	984

Source: An Alaskan's Guide to the Permanent Fund, at 15 (1994 Ed. No.7).

APPENDIX Q

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

United States Constitution

Article I, § 10.

Restrictions upon powers of states. No state shall enter into any treaty, alliance or confrontation; grant letters of marque and reprisal; coin money, emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law *or law impairing the obligation of contracts*, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the trea-

sury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

The United States Constitution,

Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The United States Constitution, Amendment XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Alaska Statute
43.23.005
Eligibility.
[former statute]

(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if the individual applies to the department, and if

(1) on the date of application the individual is a state resident;

(2) the individual was a state resident for a period of at least 24 consecutive months immediately preceding April 1 of the current dividend year; and

(3) the individual has been physically present in the state at some time during the period beginning July 1 two years before the date of application and ending on the date of application.

(b) In determining the minimum period of an individual's residency required under

(a)(2) of this section, the department may include months of residency both in the current year and in the immediately preceding year.

(c) A parent, guardian, or other authorized representative may claim a permanent fund dividend on behalf of an unemancipated minor or on behalf of a disabled or an incompetent individual who is eligible to receive a payment under this section.

(d) Notwithstanding the provisions of (a - (c) of this section, an individual who has been convicted of a felony is not eligible for a permanent fund dividend for a year when, during all or part of the fiscal year ending June 30 of the current year, as a result of the conviction the individual is incarcerated. This subsection applies whether or not the individual has applied for the dividend.

(e) If a court finds the durational

residency requirement under (a) (2) of this section is invalid and no appeal is pending, the residency requirement is one year. If a court finds the one year residency requirement is invalid and no appeal is pending, the residency requirement is the longest duration permitted by law. The department shall change the statement of eligibility under AS 43.23.015(b) as necessary to conform to this subsection. (§ 1 ch 102 SLA 1982; am§ 1 ch 57 SLA 1987; am § ch 54 SLA 1988; am § 1 ch 159 SLA 1988; am §§ 2, 3 ch 107 SLA 1989; am § 1 ch 68 SLA 1990)

Alaska Statute
43.23.005
Eligibility.
[Present statute]

(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if

(1) the individual applies to the department;

(2) on the date of application the individual is a state resident;

(3) the individual was a state resident for at least the calendar year immediately preceding January 1 of the current dividend year;

(4) the individual has been physically present in the state at some time during the prior two calendar years before the current dividend year; and

(5) the individual is

(A) a citizen of the United States'

(B) an alien lawfully admitted for permanent residence in the United States;

(C) an alien with refugee status under federal law; or

(D) an alien that has been granted asylum under federal law.

(b) [Repealed, § 18 ch 4 SLA 1992.]

(c) A parent, guardian, or other authorized representative may claim a permanent fund dividend on behalf of an unemancipated minor or on behalf of a disabled or an incompetent individual who is eligible to receive a payment under this section. Notwithstanding (a)(2) - (4) of this section, a minor is eligible for a dividend if, during the two calendar years immediately preceding the current dividend year, the minor was born to or adopted by an individual who is eligible for a dividend for the current dividend year.

(d) Notwithstanding the provisions of (a) - (c) of this section, an individual who has been convicted of a felony is not eligible for a permanent fund dividend for a year when, during all or part of the previous calendar year, as a result of the conviction, the individual is incarcerated.

(e) [Repealed, § ch 21 SLA 1991.]

(f) In a time of national military emergency, the commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual. (§ ch 102 SLA 1982; am § 1 ch 57 SLA 1987; am § 1 ch 54 SLA 1988; am § 1 ch 159 SLA 1988; am §§ 2, 3 ch 107 SLA 1989; am § 1 ch 68 SLA 1990; am §§ 46, 62 ch 21 SLA 1991; am § 1 ch 68 SLA 1991; am §§ 4 - 8, 18 ch 4 SLA 1992)

Alaska Statute
43.23.011
Application period.

An application for permanent fund dividend shall be filed during the period that begins January 2 and ends March 31 of that dividend year. (§ 9 ch 4 SLA 1992).